THE

PRACTICE AND EVIDENCE

IN CASES OF

DIVORCE

AND OTHER

MATRIMONIAL CAUSES:

Together with the Acts, Rules, Forms, &c.

BY

RICHARD THOMAS TIDSWELL, M.A.,

AND

RALPH DANIEL MAKINSON LITTLER, B.A.,

OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

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WILLIAM HENRY COX,
5, Great Queen Street, Lincoln's Inn Fields.

TO

The Right Honourable

SIR CRESSWELL CRESSWELL,

Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes,

ETC., ETC.,

THIS WORK

IS,

BY HIS LORDSHIP'S KIND PERMISSION,

MOST RESPECTFULLY

Dedicated.

PREFACE.

THE object of the Authors has been to produce, at the lowest possible price, a book useful to both branches of the Profession; enabling the Solicitor clearly to see whether he has a foundation to work upon, and how to work, and, at the same time, valuable to his brethren at the Bar, as containing, in a shape convenient alike for the pocket or bag, and for Court use, all the decisions now upheld of both the Old and the New Courts. In the "Practice" (for which the senior Author is responsible), will be found a complete summary of the decisions in that branch; in the "Digest of Evidence" (by his coadjutor) are collected together all the decisions (*ipsissimis verbis*), without gloss or comment, which can guide the profession in the selection of evidence, and in judging the probable effect which, notwithstanding the recent changes, such evidence will have when adduced in Court; while in the Appendix will be found all the necessary Acts of Parliament and the Rules and Orders of the Court, with such skeleton Forms as may guide in framing others.

Deeply impressed with the necessity of making

their work as complete as could be, the Authors have delayed its publication as long as possible, and they feel justified by the result, since they can now add both the late important decisions, and the latest Amendment Act, which considerably affects the custody of children, marriage-settlements, and also admits evidence hitherto rejected.

They are aware that such a book must be far from perfect; but they are convinced that if it in any measure realise their ideas, it must prove useful; and they trust that, lightening the labour of many, it may at least obtain some favour from those whom its object is to assist.

TEMPLE, R. T. T.
January 11*th*, 1860. R. D. M. L.

TABLE OF CASES.

ADDENDA ET CORRIGENDA.

Page 1, line 1, dele second "the."

„ 7, bottom, add, it is doubtful whether the Court can, after a divorce *a mensâ et thoro*, hear a petition for judicial separation. *Ciocci* v. *Ciocci*, 1 Sear. & Sm. 24.

„ 17, line 7, add, and if a citation has issued for dissolution of marriage on the ground of adultery and desertion, and the petition is afterwards amended by adding a charge of cruelty, if the respondent has appeared a fresh citation is not requisite. *Rowley* v. *Rowley*, 29 L. J. P. & M. 15.

„ 31, line 11, for "54," read 51.

„ 31, line 16, ditto.

„ 37, line 9 from bottom, add, and in *Seller* v. *Seller*, 28 L. J. P. & M. 99, the demurrer was overruled.

„ 45, line 26, for "MSS." read 28 L. J. 30 (note).

„ 50, line 1, dele "notice shall."

„ 50, line 25, dele "L. T."

„ 52, line 8, add—

A respondent charged with adultery did not traverse, but pleaded adultery, cruelty, and wilful misconduct on petitioner's part:—Held, that the jury could not take cognizance of the allegation not traversed, and that the respondent was bound to begin, and that after verdict against her on those pleas she could not cross-examine on the allegations not traversed. *Bacon* v. *Bacon and Bacon*, 1 Sear. & Sm. 68.

„ 52, lines 18 and 21, for "L. J." read L. T.

„ 54, line 5, after "80," add, but see now 22 & 23 Vict. c. 61, s. 6, App. liii*b*.

„ 54, lines 17 and 18, for "*Lane* v. *Lane and Robinson*," read *Robinson* v. *Robinson and Lane*.

„ 55, line 2 from bottom, for "awful," read lawful.

„ 59, line 13, after "*vixerit*," add, but see now 22 & 23 Vict. c. 61, s. 5, App. liii*b*.

„ 60, line 6, after "decree," add, or even after such final decree has been made.

Page 60, line 14, after "35," add, 22 & 23 Vict. c. 61, s. 4. App. liii.

„ 61, line 18, for "L. J." read L. T.

„ 64, line 9 from bottom, add—

The order for permanent alimony should be embodied in the decree dissolving the marriage; and if this be neglected and the decree has been pronounced and registered, the Court cannot interfere, *Vicars* v. *Vicars*, 29 L. J. P. & M. 20.

„ 65, line 8, add, where the Court is satisfied of the husband's poverty, it will not grant an attachment, but will allow a *fi. fa.* to issue. *Ward* v. *Ward*, 29 L. J. P. & M. 17.

„ 68, line 16, for "affects," read affect.

„ 73, line 1, dele "fore."

„ 73, line 19, for "*Harner*," read *Hamer*.

„ 76, line 12, add, where in a suit of nullity the pretended husband had deceived the alleged wife with regard to the validity of the marriage he was ordered to pay her costs. *Midgeley* v. *Wood*, 1 Sear. & Sm. 70.

„ 78, line 3, for "not yet reported," read 28 L. J. P. & M. 94.

„ 78, line 11, add, but if the Court is satisfied of the husband's inability to pay costs, it will be unwilling to grant an attachment. *Ward* v. *Ward*, 29 L. J. P. & M. 17. The wife may claim to have a sum deposited in the registry as a security for costs; and that sum will be appropriated to her costs in any event; but if she fails, no more will be allowed. *White* v. *White*, 1 Sear. & Sm. 77.

„ 81, line 18, add, but where a petition for dissolution on the ground of adultery, desertion, and cruelty, had been heard before the new act, and the evidence of desertion and cruelty having failed a decree of judicial separation had been pronounced, it was held that a new petition for dissolution could not be filed. *Bevan* v. *Bevan*, 1 Sear. & Sm. 76.

„ 83, line 7, for "38," read 33.

„ 83, line 3 from bottom, for "39," read 32.

„ 84, line 9, for "2 Hagg. 248," read 1 Hagg. Con. 248.

„ 84, line 10, for "2 Hagg. 441," read 2 Hagg. Con. 441.

„ 84, line 11, for "2 Hagg. 431," read 2 Hagg. Con. 431.

„ 86, line 1, for "1 Hagg." read 2 Hagg.

„ 92, line 13, add, and where a petitioner alleged that he was a surgeon, and that the co-respondent lived in his house as assistant for two years, and that the adultery was committed "on divers occasions" during that period; this was held sufficient to inform the respondent of the

kind of case she had to meet. *Smith* v. *Smith and Liddard*, 1 Sear. & Sm. 1.

Page 96, line 17, for "1 Hagg. 303," read 1 Hagg. Con. 303.

„ 97, line 4, for '2 Hagg. C." read 2 Hagg. Con. 11.

„ 103, line 3, for " 2 Hagg." read 1 Hagg.

„ 103, line 10 from bottom, for " 721," read 722.

„ 103, line 9 from bottom, for " solicition," read solicitation.

„ 106, line 17, for "2 Hagg." read 3 Hagg.

„ 108, line 18, for "17," read 173.

„ 108, line 19, dele " *Smith* v. *Huson*, 2 Phill. 254."

„ 109, line 8, for "30," read 50.

„ 112, line 5 from bottom, for "2 Hagg." read 2 Hagg. Con.

„ 113, line 8 from bottom, for "27," read 28.

„ 120, line 5, add, the wife is not entitled to alimony where judicial separation has been decreed by reason of her cruelty. *White* v. *White*, 1 Sear. & Sm. 77.

„ 122, line 11 from bottom, for "25," read 28.

„ 128, line 6 from bottom, for " 3 Hagg." read 1 Hagg.

„ 132, line 7, for " 708," read 768.

„ 133, line 11, for " 708," read 768.

„ 135, line 7 from bottom, for 186," read 86.

„ 160, line 3 from bottom, for "iii," read 111.

„ 164, line 8, for "2 Add. 27," read 2 Lee, 593.

„ 164, line 18, for "C. 459," read 1 Hagg. C. 459.

„ 165, line 6 from bottom, add, where the husband from the wife's drunken habits was in danger of bodily injury, separation was decreed. *White* v. *White*, 1 Sear. & Sm. 77

„ 166, line 2, for "2 Add." read 2 Add. 292.

„ 171, line 14, for " 3 Rob." read 1 Rob.

„ 183, line 3, add, the Court will not call the petitioner in order to support his own case, or to negative any suspicion that has arisen in the course of it, but will only call him in order to satisfy itself, and to prove there was no excuse. *Haswell* v. *Haswell and Saunderson*, 29 L. J. P. & M. 21; S. C. 1, Sear. & Sm. 34; *Evans* v. *Evans*, *Ib.* 35 (note). The Court will allow his counsel to suggest questions in order to clear up what the Court has elicited. 29 L. J. P. & M. 21. Where affirmative evidence of collusion was given, the Court refused to examine the petitioner. *Lloyd* v. *Lloyd and Chichester*, 1 Sear. & Sm. 39.

„ 186, line 3 from bottom, for "17," read 27.

„ 186, line 8, after "24," add, affirmed on appeal to the House of Lords. *Dolphin* v. *Robins*, 29 L. J. P. & M. 11.

Page 194, line 16, for "2 Hagg. 321," read 2 Hagg. Con. 321.

„ 195, line 5, add, The Court cannot now order any case to be heard *in camerâ*. *Barnett* v. *Barnett*, 1 Sear. & Sm. 20; *Hall* v. *Castleden*, *Ib.* 29.

„ 197, line 15, for "1 Hagg. 414," read 1 Hagg. Con. 414.

„ 207, line 16, dele "1 Hagg. 393."

„ 210, line 7, for "184," read 684.

„ 210, line 18, for "809," read 309.

„ 216, line 9, for "1 Curt." read 2 Curt.

„ 216, line 18, for "1 Hagg. Con." read 2 Hagg. Con.

„ 217, line 5, for "1 Hagg. Con." read 2 Hagg. Con.

„ 217, line 8 from bottom, add, Where the man's name was "Bower," but the banns were published in the name of "John," both parties knowing the fact, the marriage was declared null. *Midgeley* v. *Wood*, 1 Sear. & Sm. 70.

„ 231, line 1, for "sparated," read separated.

„ 231, line 14, for "3 Curt. 233," read 3 Curt. 235.

THE

LAW OF DIVORCE.

INTRODUCTION TO THE PRACTICE.

THE COURT.

THE the New Court for Divorce and Matrimonial Causes consists of two branches, one of which is now presided over by the Right Honourable Sir Cresswell Cresswell, who is called the Judge Ordinary of this Court, and who, at the same time, is the Judge of the Court of Probate, 20 & 21 Vict. c, 85, s. 9; and the other consisting of the Lord Chancellor, the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, or any of the Puisne Judges for the time being in each of the three last-mentioned courts, and the Judge of her Majesty's Court of Probate, 20 & 21 Vict. c. 85, s. 8; 22 & 23 Vict. c. 61. s. 1, two at least of whom, besides the Judge Ordinary, are by sec. 10 of the first Act required to form the Full Court. It becomes therefore necessary for counsel, proctors, or solicitors, when drawing petitions, or any other

pleadings, motions, or applications to consider whether they should address them to "The Judge Ordinary of her Majesty's Court for Divorce and Matrimonial Causes," or to "The Judges of her Majesty's Court for Divorce and Matrimonial Causes," *Evans* v. *Evans and Robinson*, 6 W. R. 356; 1 S. & T. 79, 27 L. J. 31; *Wright* v. *Wright*, 27 L. J. 32, 31 L. T. 370 (*a*).

We will now, therefore, briefly point out,—1stly, what cases, &c. the Judge Ordinary is authorized to take cognizance of; and, 2ndly, what come within the cognizance of the Full Court, as we, for the reasons stated in the note to this page, shall call that branch which alone has power to dissolve the marriage tie.

THE JUDGE ORDINARY.

The 20 & 21 Vict. c. 85, s. 9, confers authority upon the Judge Ordinary, either when sitting alone, or with one or more of the other Judges of the Full Court, to hear and determine all divorce and matrimonial matters, except petitions for dissolving or annulling marriages, applications for

(*a*) *Evans* v. *Evans and Robinson* is reported differently. In S. & T. 79, the form is, "the Court;" also in 6 W. R. 356; while 27 L. J. 31, gives "the Full Court:" which latter term for the Court authorized to dissolve marriages is expressly used in 20 & 21 Vict. c. 85, ss. 55, 56, in 21 & 22 Vict. c. 108, ss. 13 and 18, and in 22 & 23 Vict. c. 61, s. 2. The form in the text is the one most used in practice.

new trials of questions or issues before a jury (*a*), bills of exception, special verdicts, and special cases; so that he, either sitting alone, or with one or more other judges in open court, can and does grant protection orders to deserted wives, 20 & 21 Vict. c. 85, s. 21, 21 & 22 Vict. c. 108, s. 6; or at chambers in simple cases, rule 39: decides applications for restitution of conjugal rights, *Hope* v. *Hope*, 27 L. J. 43; *Cherry* v. *Cherry*, 32 L. T. 198; or for judical separation, *Curtis* v. *Curtis*, 6 W. R. 409; *Marchmont* v. *Marchmont*, 6 W. R. 870; 20 & 21 Vict. c. 85 s. 17: or for jactitation of marriage; hears appeals against protection orders granted to deserted wives by police magistrates and justices in petty sessions, 20 & 21 Vict. c. 85, s. 21: and also could, by s. 20 of the same Act, have heard appeals against the orders made by judges at assizes in cases of judicial separation and restitution of conjugal rights, hitherto cognizable by them, 20 & 21 Vict. c. 85, s. 18; but these clauses are now repealed by 21 & 22 Vict. c. 108, s. 19, inasmuch as they were not in a single instance taken advantage of, probably owing to the many difficulties and obstacles which would necessarily have arisen in endeavouring to carry them into

(*a*) Applications may now, by 21 & 22 Vict. c. 108, s. 18, be made to the Judge Ordinary to grant a rule nisi for a new trial in jury cases, either tried before him or before the full court.

operation: also, in cases where personal service cannot be effected, decides upon motion (*a*) in open court, whether there may be substituted service, or whether service may be dispensed with altogether, rule 10: grants or refuses amendments to any petition, answer, or subsequent statement or pleading, rule 19, *Evans* v. *Evans & Robinson*, 27 L. J. 32, 6 W. R. 356; *Pyne* v. *Pyne*, 6 W. R. 507: and when the proceedings have raised the questions of fact necessary to be determined, directs the truth of any question of fact arising in the proceedings to be tried by a jury upon the wish of either party, rule 20; or himself determines whether the same shall be tried by a jury, or before the court itself, or whether by oral evidence or upon affidavits, rule 21: and when a case is to be tried before a jury, directs the questions at issue to be stated in the form of a record, to be settled by one of the registrars, rule 22, somewhat after the form given in the Appendix, page 77, and can allow the

(*a*) Motions in open court must be made by counsel when the petitioner is acting through a proctor, solicitor, or attorney: *Drake* v. *Morgan*, 27 L. J. 1, 4 Jur. 32. And, moreover, in the absence of counsel the court will not allow the proctor, solicitor, or attorney employed in the suit to open the case, but will either allow the case to be postponed to the next sittings, on payment of costs of the day, or allow the petitioner to conduct his own case entirely, but not until the arrival of counsel, and for the latter then to conclude the case: *Lentge* v. *Lentge and Hopson*, MSS.

record, after being so settled, to be altered or amended, rule 23; after which, unless otherwise directed by him, the cause will come on in its turn, rule 24: may certify that a refusal to admit any document is reasonable, rule 32: may allow counter affidavits to be filed, rule 37: and order a deponent in the cause to be produced for the purpose of cross-examination, rule 38; but not for the purpose of confrontation to prove the identity, as was the practice in the Ecclesiastical Courts, *Hooke* v. *Hooke*, 28 L. J. 29: decides whether a person shall be allowed to prosecute a suit in *formâ pauperis*, rule 43, *Astrope* v. *Astrope*, MSS.: whether pleadings shall be admitted after the time specified, *Fowler* v. *Fowler and Newcomen*, MSS., and who shall pay the costs of any delay in the cause, rule 46; and likewise with affidavits, 47: and may also extend the time for the performance of any act, with such qualifications and restrictions, and on such terms as to him may seem fit, rule 57: has power to enforce any order or decree in respect of costs made heretofore in the old Ecclesiastical Courts, 21 & 22 Vict. c. 108, s. 14: has control over proctors, solicitors, and attorneys practising in the New Court, 21 & 22 Vict. c. 108, s. 15: may appoint commissioners to administer oaths in the Isle of Man, or in the Channel Islands, 21 & 22 Vict. c. 108, s. 16: also may issue a commission, or give orders for

the examination of witnesses abroad, or of those who through excessive debility, infirmity, or sickness, or otherwise are unable to attend, 20 & 21 Vict. c. 85, s. 47: and may grant a rule nisi for a new trial in any cause which shall have been tried before the full court, or before himself, 21 & 22 Vict. c. 108, s. 18, and, it is submitted, by any other judge sitting for him, as in *Evans* v. *Evans and Robinson*, where the Honourable Mr. Baron Martin, at the Judge Ordinary's request, was the judge before whom certain issues were tried: "questions of fact may be tried either before the full court itself, or before any one or more of the judges of the full court by the verdict of a special or common jury, 20 & 21 Vict. c. 85, s. 36; upon any issue directed by the full court, or by himself, subject to any future rules and orders, 21 & 22 Vict, c. 108, s. 18:" sits in chambers (at present selected by himself, 21 & 22 Vict. c. 108, s. 2), and there has and exercises the same power and jurisdiction in respect of the business to be brought before him as if sitting in open court, 21 & 22 Vict. c. 108, s. 3.

It may here be mentioned that by the first section of the second Probate Act, viz., 21 & 22 Vict., c. 95, the judge of the High Court of Admiralty and the judge of the Court of Probate may now sit for each other, and, in that case, equal authority is conferred upon the judge of the High Court of Admiralty when so sitting:

and, as the judge of the Court of Probate is also the Judge Ordinary of the Divorce Court, 20 & 21 Vict. c. 85, s. 9, he may, it is submitted, sit as Judge Ordinary: however, this has not occurred as yet. All serjeants and barristers-at-law are entitled now to practise in the Probate Court either in non-contentious or contentious business, 21 & 22 Vict. c. 95.

With respect to costs the Judge Ordinary is autocratic, and may order either party, or any one of the parties to the suit in cases where there are more than a petitioner and one respondent to pay them: and in applications for alimony, either *pendente lite* or after a decree, authority is vested in him to determine upon the amount to be so paid, and also by what payments, 20 & 21 Vict. c. 85, ss. 24 & 32: however, more will be found under the heading of "Alimony," and also as to his power regarding the custody of children, 20 & 21 Vict. c. 85, s. 34, under the latter heading, *post*; and may order an attachment against those who refuse or omit to perform any order or decree of the court as to the costs or otherwise, *Oates* v. *Oates*, MSS., where an application was made to his Lordship to enforce an order on the husband to pay his wife's costs, and a given number of days was then allowed to the husband to pay, or final proceedings would be granted against him. More will be found on this subject under the heading of "Costs," *post*.

THE FULL COURT.

This court, as stated in the last chapter, must consist of at least three judges, of whom the Judge Ordinary is to be one, 20 & 21 Vict. c. 85, s. 10, except when otherwise provided, 20 & 21 Vict. c. 85, s. 11. It has exclusive authority over suits for divorce and suits for nullity of marriage: grants or refuses applications for new trials of questions or issues before a jury(*a*): hears and decides upon bills of exceptions, special verdicts, and special cases; subject, however, to the right of appeal, 20 & 21 Vict. c. 85, s. 39, which appeal, as will be found under that heading, is to the House of Lords, 20 & 21 Vict. c. 85, s. 56, and 21 & 22 Vict. c. 108, s. 17; and has power and authority to make a rule absolute for a new trial, 21 & 22 Vict. c. 108, s. 18; and, of course, to discharge a rule nisi, granted by the Judge Ordinary, *Curtis* v. *Curtis; Keats* v. *Keats and Montezuma*, 5 Jur. 176, for this court hears and finally decides appeals against the decisions of cases cognizable by the Judge Ordinary when sitting alone, 20 & 21 Vict. c. 85, s. 55.

(*a*) Concurrently now with the Judge Ordinary so far as regards granting a rule nisi, 21 & 22 Vict. c. 108, s. 18.

THE PRACTICE.

CHAPTER I.

COMMENCEMENT OF CAUSE.

After having come to the conclusion that the circumstances (*a*) of any case cognizable in either branch of the Divorce and Matrimonial Court afford good or sufficient grounds for taking steps to procure redress for the grievances complained of, it becomes necessary to resort to and adopt the ordinary and prescribed means for setting the court in motion; and the court itself has, for the purposes of uniformity and regularity of practice, made certain rules and orders, copies of which will be found in extenso in the Appendix from page 53 to page 61. By the first of these rules it requires that proceedings before it shall be commenced by filing a petition at the Registry Office, which for the present is situated at 13, Godliman Street, Doctors' Commons.

The nature and requirements of the petition we now proceed with.

(*a*) For the law relating to this subject, vide the "Digest of Evidence."

THE PETITION.

This term which is adopted from Chancery was, in the old Ecclesiastical Court, called a libel, and has much in common with a declaration at common law.

It is a written statement properly intituled either "To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes," or "To the Full Court of Her Majesty's Court for Divorce and Matrimonial Causes," (*a*) according to the branch to which it is to be submitted.

Next comes the date, and the statement of whose petition it is, and the residence of the petitioner.

According to the form issued with the first rules and orders it should now be paragraphed, stating

Firstly. The marriage of the petitioner, the date of the said marriage, and the party to whom married; and whether a bachelor, widower, spinster, or widow; and where the marriage was solemnized; whether at a church or elsewhere.

Secondly. Subsequent cohabitation, where, and for how long, and the issue, if any, of the same.

(*a*) Vide note (*a*) on page 2.

Thirdly. The adultery (*a*) should first be alleged, if any there be.

Fourthly Other adultery, cruelty, desertion, bigamy, incest, rape, sodomy, or bestiality, if any there be, and according to what is sought.

Then comes the prayer for a decree, and the relief sought, with a conclusion.

Forms of various petitions will be found in the Appendix, on page 73 to 82.

The chief points in framing the petition are, to avoid pleading evidence, *Allen* v. *Allen and D'Arcy*, 5 Jur. 128; also unnecessary verbiage and surplusage; and to distinctly aver the

(*a*) Adultery must be alleged and proved against a woman to get a divorce. Rape, sodomy, or bestiality, incestuous adultery, or bigamy, or adultery coupled with cruelty, or adultery coupled with desertion, without reasonable excuse for two years or upwards, must be proved against a man to obtain a divorce, 20 & 21 Vict. c. 85, s. 27; but a judicial separation may be obtained either by the husband or the wife on the ground of adultery, or cruelty, or desertion without reasonable cause for two years and upwards, 20 & 21 Vict. c. 85, s. 17; and a protection order may be obtained by a wife any time after wilful desertion, 20 & 21 Vict. c. 85, s. 21, ex parte *Hall* 27 L. J. 19; but a bonâ fide offer of the husband to return and provide for her will bar her right to an order, though not to a divorce, *Cargill* v. *Cargill*, 27 L. J. 69; provided the offer to return and provide, &c., for her was not made before the 20 & 21 Vict. c 85, came into operation, *Brookes* v. *Brookes*, 5 Jur. 76; and when the petition alleges desertion only, evidence of cruelty will not be received. See also the "Digest of Evidence."

grounds upon which the petitioner relies. In the case of *Pyne* v. *Pyne*, 1 S. & T. 80, 6 W. R. 507, his Lordship advised that the petition should be amended, as it did not distinctly aver desertion; and then added, "that it may be right to state some circumstances, though care should be taken not to plead evidence." Nor ought the counts in it to contain long rambling statements, as, although in one such case the Judge Ordinary would not, on application, order the unnecessary parts to be struck out, yet he strongly intimated that, on taxation, they would not be allowed, *Forster* v. *Forster and Evans*, 31 L. T. 104; and upon a further objection taken to it, inasmuch as neither the affidavits, nor any of the counts in the petition, stated the issue of the marriage, the Judge Ordinary said, "I do not think that you can require the issue specified." This, however, does not strongly approve of a mere general statement that there were certain children, issue of the said marriage; the better course, apparently, would be to state that there were certain children, issue of the said marriage, to wit, three sons and two daughters, *pro re nata*.

Where cruelty is alleged, however, such acts should be specified as, if proved, will constitute legal cruelty, *Suggate* v. *Suggate*, 28 L. J. 7; and acts of cruelty committed on the children in the presence of their mother may be inserted, inasmuch as these, when done in her presence, are

cruelty to her. But when cruelty is not alleged in a petition, evidence of it will not be received. *Brookes* v. *Brookes*, 5 Jur. 76.

It does not require the signature of counsel like a bill in equity; although, in any but the simplest cases, it is advisable for all parties that it should be drawn or, at least, examined by counsel.

A petition may be amended; but in that case notice ought to be given to the opposite party, *Wright* v. *Wright*, 6 W. R. 507; or may be withdrawn after due notice to the other side, *Lutwyche* v. *Lutwyche*, 5 Jur. 76: and, if amended, must be served over again, *Day* v. *Day*, MSS.

Whether, however, the opposite party or parties will have twenty days to answer the amendment is doubtful. In Common Law a less time is generally ordered.

The petition must be served on the party to be affected thereby, either within or without Her Majesty's dominions, 20 & 21 Vict. c. 85, s. 42; and every petition must be accompanied by an affidavit made by the petitioner, verifying the same so far as he or she is able to do so, 20 & 21 Vict. c. 85, s. 41; also those facts of which he or she has personal cognizance, or must swear to the best of his or her belief, vide the last application in *Tourle* v. *Tourle and Renshaw*, 27 L. J. 53; and such affidavit must be filed with the petition, rule 2: also when the petitioner seeks a decree affecting marriage and its relative duties

and responsibilities, either partially so, as in a judicial separation [equivalent now to what was formerly called a divorce *a mensâ et thoro*], or a total severance, as in a divorce, as well as when it merely seeks a decision of the Court against an alleged or a voidable marriage, as in cases where the petition is for a jactitation of marriage; or in a suit for nullity of marriage, the affidavits must then state, in addition, that there is not any collusion or connivance between the deponent and the other party to the marriage, 20 & 21 Vict. c. 85, s. 41.

A petition may pray for a divorce by a wife: and in case the evidence produced at the trial should only be sufficient in law for a judicial separation, the latter has been granted, *Smith* v. *Smith*, 28 L. J. 27, 32 L. T. 394, 7 W. R. 382.

Every petitioner forthwith, after filing his or her petition and affidavit, must issue and serve on the respondent in the cause a citation, rule 4; and also upon any party whom he intends to make a co-respondent in the same cause, rule 5; and must deliver, along with each citation, a copy of the petition certified under the seal of the Court, rule 6 (*a*).

(*a*) There is here a considerable variation from the proceedings in a common law action; as, in the latter practice, the declaration, which, to a certain degree, a petition resembles, cannot be filed until nine days after service of the writ of summons, unless the defendant has

THE CITATION.

This is the term used in this court for the summons served on the respondent or respondents to appear and answer in order to defend himself herself, or themselves from the charges alleged in the petition, which, as we before stated, by rule 6 must accompany each and every citation, and is equivalent to a writ of summons in a Chancery suit, or in an action at common law. (*a*)

Beside the citation served on the respondent, another citation, together with a copy of the petition, must be served upon any party whom it is intended to make a co-respondent in the same cause, rule 6; however, power is left to the court to excuse the husband, if petitioning, from citing a co-respondent, but only on special grounds: and may also direct, in cases where the wife is petitioning, that the person with whom she alleges her husband to have committed adultery, be made a co-respondent, 20 & 21 Vict. c. 85, s. 28.

appeared to it. Here, it will be observed, both a citation and a certified copy of the petition must be delivered, either together, or immediately after one another, at the commencement of proceedings.

(*a*) The term is not peculiar to this court, for it is still used in the University Court of Oxford, and, formerly, in that at Cambridge. It is derived from the word *citatio*, in the Roman or civil law, upon which code much of the ecclesiastical law is also founded.

In most of the cases already decided the practice has, in accordance with the general tenor of the Act, been for the husband, when petitioning, to cite both his wife and her alleged adulterer, *Norris* v. *Norris and Gyles*, 6 W. R., 640, 27 L. J. 51; *Tourle* v. *Tourle and Renshaw*, 6 W. R. 544; *Weber* v. *Weber and Pyne*, 28 L. J. 11, 6 W. R. 867, 31 L. T. 302; and for the wife when petitioning to cite her husband only, *Robotham* v. *Robotham*, 1 S. & T. 73, 6 W. R. 328, 27 L. J. 33, 22 Jur. 448; *Pyne* v. *Pyne*, 6 W. R., 507, 1 S. & T. 80, 30 L. T. 376.

The citation, like many other legal documents, must be written or printed on parchment; and the party taking out the same, or his or her proctor, solicitor, or attorney, must take it together with the præcipe, to the Registry, there deposit the præcipe, and get the citation signed and sealed, rule 7: also, upon applying for the citation to be sealed, must, on depositing the præcipe in the Registry, give an address within three miles of the General Post Office, at which it shall be sufficient to leave all notices, instruments, and other proceedings not expressly requiring personal service, rule 8.(*a*)

After serving a citation an indorsement must be made upon it, rule 13; a form of which will be

(*a*) This is similar to the 165th Common Law rule of H. T. 1853, and the 17th Chancery Order of October, 1842.

found in the Appendix, page 72; and, moreover, in cases where personal service is either substituted or dispensed with altogether, the citation, in accordance with former practice conjointly with the 13th rule, must be returned into the Registry, *Cooke* v. *Cooke and Quayle*, 5 Jur. 103.

The præcipe, mentioned in the last rule, is a short note of instructions, specifying the names of the petitioner, and respondent, and co-respondent (if any there be to the suit), the nature of the petition, the name of the proctor, solicitor, or attorney issuing the citation, which is handed to the registrar, who seals the citation, and files the præcipe.

A form of the præcipe is given in the Appendix, page 72. Forms for a præcipe for subpœna *ad testificandum*, and for subpœna *duces tecum*, will also be found in the Appendix, page 76.

Forms of citation will be found in the Appendix, on page 71.

SERVICE ON OPPOSITE PARTY.

Personal service of a citation shall be effected by leaving a copy of the citation with the party cited, and producing the original, if required, by him or her, rule 11; and after personal service of citation has been effected, the citation, with the certificate of service endorsed thereon, shall be

forthwith returned into and filed in the Registry, rule 13; (*a*) after which an interval of twenty-one days must elapse before the petitioner can proceed to prove his or her petition, provided the respondent refuses or neglects to file his or her answer, rule 14.

In cases, however, where personal service cannot be effected, application may be made to the Judge Ordinary upon motion in open court, to substitute some other mode of service, or to dispense with service altogether, rule 10.

There are many cases where personal service has been required, notwithstanding application to dispense with it: *Robotham* v. *Robotham*, 6 W. R. 328, 1 S. & T. 73, 27 L. J. 33, 22 Jur. 448, 30 L. T. 326; Ex parte *Armitage*, 6 W. R. 222; *Chandler* v. *Chandler*, 27 L. J. 35 (but afterwards allowed, 28 L. J. 7); *Allen* v. *Allen*, 28 L. J. 25 (in notes); *Sudlow* v. *Sudlow*, 28 L. J. 4, and notes, also vide 28 L. J. 30 (note).

(*a*) And in accordance with this rule a citation which had been sent to Australia was required to be returned into the Registry before further proceedings could be gone on with, although personal service upon the co-respondent, for whom the citation had been sent, was dispensed with. This shows the necessity of returning the citation, wherever it has been sent, along with the information in cases where personal service cannot be effected, *Cooke* v. *Cooke and Quayle*, 5 Jur. 103. In *Marsden* v. *Marsden*, 28 L. J. 3, in note, a citation was allowed to be sent to Australia with a blank for the Christian name of the co-respondent.

In the following cases personal service has been substituted or dispensed with:—*Dean* v. *Dean*, 4 Jur. 148, where in a petition by the wife against the husband affidavits were filed, stating that he had left his home, and it was found impossible to serve him with the citation, service was dispensed with by the Judge Ordinary, who observed that from this being a petition for a judicial separation, and not for a dissolution of marriage, he had a clear jurisdiction in the matter. From this it will be perceived that there was some doubt whether the Judge Ordinary sitting by himself could grant such an application in cases where a decree of dissolution or of nullity of marriage is sought: however the doubt as to the Judge Ordinary's authority in cases where a divorce is sought, would appear cleared away by the following cases, where the petition has been for a divorce:—*Chandler* v. *Chandler*, 28 L. J. 6; *Cooke* v. *Cooke and Quayle*, 28 L. J. 5 (and note); *Tomkin* v. *Tomkin*, 27 L J. 54; *Rowe* v. *Rowe and Marsh*, MSS.; *March* v. *March*, 28 L. J. 30.

In the following cases the court has dispensed with citing a co-respondent:—*Hook* v. *Hook*, 6 W. R. 868, 27 L. J. 61, 31 L. T. 269; *Hunter* v. *Hunter and Vernon*, 28 L. J. 3; *Peckover* v. *Peckover and Jolly*, 31 L. T. 269; *Jonas* v. *Jonas*, MSS.; *Tomkins* v. *Tomkins and another*, 31 L. T. 186; *Evans* v. *Evans*, 28 L. J. 20; *Lacey* v.

Lacey, 28 L. J. 25; *Tollemache* v. *Tollemache*, 28 L. J. 2; *Marsden* v. *Marsden*, 28 L. J. 3 (note).

It is submitted that it is not necessary, although some police magistrates have thought otherwise, to serve the husband with a citation when the wife petitions the court under the 20 & 21 Vict. c. 85, s. 21, and 21 & 22 Vict, c. 108, s. 6, for a protection order for her property acquired since the desertion of her husband, *Ex parte Hall*, 27 L. J. 19; and, consequently, that no citation need be served in the more simple cases where the wife through counsel, or a proctor, solicitor, or attorney applies to the Judge Ordinary in chambers for a similar order, as she is enabled to do, rule 19; by which course not only does she avoid the publicity of police reports, but also the conflicting decisions of different police magistrates and justices at petty sessions, who are also empowered to grant protection orders, 20 & 21 Vict. c. 85, s. 21.

In the *ex parte* case of a Mrs. Maria Seller, who moved through counsel in open court for a similar order, though under different circumstances, notices were first ordered to be inserted in two papers, and upon a further affidavit being filed, and another and later application to the Judge Ordinary, notifying that the advertisements had met with no answer, his Lordship granted an order: but the affidavit in support of such an application should state sufficient facts to satisfy the

court of the fact of desertion, *Ex parte Dorothy Sewell*, 28 L. J. 8.

APPEARANCE.

An appearance must have been previously entered by or on the behalf of the party cited, or an affidavit of personal service of the citation must have been filed in the registry before a party can proceed after the service of a citation, unless by the express consent of the court, rule 9; and every entry of an appearance must be accompanied by an address within three miles of the General Post-office, at which it will be sufficient to leave all notices, instruments, and other proceedings, rule 12.

Of course it is not absolutely necessary for any respondent to enter an appearance, but when entered it must, at the latest, be within twenty-one days from the service of the citation to be of any avail, unless by special leave of the court; and the answer also within the same time, rule 14.

The consequences, however, of neglecting or refusing to enter or have an appearance entered, are somewhat similar to suffering judgment to go by default in a common law action; only that in the latter case the action never comes before the public, and the defendant cannot have to pay more than what is marked on the writ of summons, and the trifling costs of a but recently commenced action, whereas in a divorce suit the

petition in such a case must be publicly proved, *Reed* v. *Reed and Davis*, MSS.; and the respondent or co-respondent has or may have to pay all the costs of the suit for his wilful negligence and contempt; and, moreover, is not allowed to be represented by counsel, or himself appear in mitigation of costs when the trial comes on, *Norris* v. *Norris and Gyles*, 6. W. R. 640, 27 L. J. 51, 31 L. T. 139, *Tourle* v. *Tourle and Renshaw*, 6 W. R. 544, 31 L. T. 155: and in cases where damages are sought, as in *Reed* v. *Reed and Davies*; *Keats* v. *Keats and Montezuma*, 5 Jur. 176, the respondent or co-respondent will not be allowed, unless, perhaps, under very peculiar and mitigatory circumstances, to be represented by counsel or himself to appear in order to get them disallowed or reduced in amount.

A form for an entry of appearance will be found on page 74, in the Appendix.

ANSWER.

An answer is a written statement containing the defence or defences of the respondent or co-respondent, which must be properly addressed either to "The Judge Ordinary," or to "The full Court for Divorce and Matrimonial Causes," *Evans* v. *Evans*, 6 W. R. 356 (*a*). It or they may merely be a simple denial of the facts stated in

(*a*) Vide note (*a*) page 2.

the petition, something like an answer in a Chancery suit, in which case no affidavit is required; or it may contain matter other than a simple denial of the facts stated in the petition, in the form of a plea or pleas, in which case it must be accompanied by an affidavit verifying such other or additional matter; and such affidavit must be filed with the answer, rule 15.

In *Hopper* v. *Hopper*, 28 L. J. 27 (note), the respondent instead of filing an answer on oath to the petition (for alimony) as required by rule 26, had filed an answer in this form: "The respondent, by G. C., his attorney, saith," &c He had also filed an affidavit verifying the answer; but the Judge Ordinary considered this was not sufficient, and that rule 26 ought to be strictly complied with.

Doubtless an answer in the same form, filed to a petition for divorce, &c., would not be considered sufficient to comply with rule 15, vide also *Tourle* v. *Tourle*, 27 L. J. 52.

Should the petition be for a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the respondent must, in the affidavit filed with the answers, further state there is not any collusion or connivance between the deponent and the other party to the marriage, rule 16.

In *Tourle* v. *Tourle and Renshaw*, 27 L. J. 52,

the Judge Ordinary stated, that, according to the system of pleading which it was intended to introduce in proceedings in this Court, each plea must be taken by itself, and should *per se* be an answer to the matter to which it is pleaded; and if it contain only an answer to part of the charge, it should be pleaded to that part. The respondent will not apparently, however, be allowed to demur to the petition, as he might to a bill in equity; for the Judge Ordinary in *Evans* v. *Evans*, 6 W. R. 356, was of opinion that under the act and rules, there is no power to move the Court to dismiss, or take any step answering to a demurrer; but that a responsive plea must be given in. In *Fowler* v. *Fowler and Newcomen*, MSS., Dec. 20, an application was made to the Judge Ordinary on behalf of the respondent to make the petitioner receive a plea some months after the time for pleading had elapsed, rule 46; but his Lordship said, "I ought not to compel the opposite party to receive a plea now, although I have some doubts whether certain paragraphs in the petition concerning settlements ought to have been put into the record."

Form of Answer will be found in the Appendix, on pp. 73 & 82.

REPLICATION.

A replication is the reply made by the petitioner or plaintiff in a cause or suit to the defence

or defences of the respondent or defendant, which he has returned in his answer. The term is common to both Chancery suits and common law causes: but it would appear that the replication in this court is more similar to an equity replication than a common law one; inasmuch as it is submitted that it will be, in most cases, the last pleading before issue is joined; and it seems doubtful whether a new assignment will be allowed: of course it must be properly intituled either to the Judge Ordinary or to the Full Court, and it must be filed within fifteen days, rule 18; in which Sundays are not computed, rule 5, 2nd Rules and Regulations; to which reply a rejoinder may be filed within fifteen days more, rule 18.

The Judge Ordinary, however, has power to allow it to be amended; but in such form and under such terms as he may approve of, rule 19.

Form of replication will be found in the Appendix, on page 82.

OTHER STATEMENTS.

Rejoinders, surrejoinders, rebutters, surrebutters, &c., may occasionally occur, rule, 18. In *Tourle* v. *Tourle and Renshaw*, 27 L. J. 52, 6 W.R. 544, 31 L. T. 155, and in *Hill* v. *Hill*, MSS., pleadings were carried on to a rejoinder; but it is not likely that they will in by far the vast majority

of cases, be extended further; and, if so, much useful information concerning them may be found in Chitty's Archbold's Practice by Mr. Prentice and Chitty's Practical Proceedings in the Courts of Queen's Bench, Common Pleas and Exchequer, as it is presumed that when such pleadings should occur they will be similar to the Common Law Proceedings; inasmuch as the rules and orders of 1858 contain nothing more than "any further statement," rule 18; or "subsequent statement," rule 19; and they were not used in the Ecclesiastical Courts, or they would have been conformed to the latter practice 20 & 21 Vict. c. 85, s. 22.

CHAPTER II.

AMENDMENTS.

An Amendment is an alteration and improvement made in any of the pleadings, when through inadvertence or on account of something that has happened since the pleading was drawn, some material fact or circumstance has been omitted which was, or has become, necessary to be pleaded.

There has been of late years a great leaning towards allowing amendments in all courts of Law both criminal and civil, and for very sensible reasons; for, otherwise, many a guilty prisoner would escape, and many causes be delayed and

unnecessary expenses incurred: but to allowing amendments as to most other matters of importance there is and ought to be a limit, such as, for instance, when an application is not made until after the trial has commenced and the prisoner's counsel has all but succeeded in acquitting him through the gross carelessness of the party who drew the indictment; or, in a civil cause, where the pleadings are either so brief that they are obscure, or so verbose and hair-splitting, or so carelessly drawn, that the judge, counsel, and jury, are unnecessarily perplexed and puzzled as to what the petitioner, plaintiff, respondent, or defendant really means or relies upon.

There is nothing said about amendments in the Acts; but they, of course, come more under the rules and orders; and we there find that if either party desire to amend his or her petition, answer, or subsequent statement, it may be done by permission of the Judge Ordinary, and in such form and under such terms as the Judge Ordinary may approve, rule 19. And even after the record has been settled by one of the registrars, either party is at liberty to apply to the Judge Ordinary to alter or amend the same, and his decision shall be final and binding on the parties, rule 23.

Cases where amendments (*a*) have been allowed,

(*a*) In one case when counsel was opening more to the jury than the settled record contained, the Judge Ordinary disallowed it, and said that the attorney was

Evans v. *Evans*, 6 W. R. 356, 27 L. J. 32, inasmuch as the pleadings were not properly intituled, *Wright* v. *Wright*, 27 L. J. 32, 6 W. R. 507, on the same ground; and in *Pyne* v. *Pyne*, 6 W. R. 507, the Judge Ordinary ordered the petition to be amended on the ground that desertion was not distinctly averred. In *Allen* v. *Allen and D'Arcy*, 5 Jur. 128, an amendment was also ordered. But when an amendment is thought desirable, notice should be given to the other party, or the petition may be withdrawn and served *de novo*, *Wright* v. *Wright*, 6 W. R. 507.

AFFIDAVITS.

An Affidavit is a written statement on oath sworn before some person duly authorized to administer it. We would particularly draw attention to the subject of affidavits in the practice of this court, as they are requisite in some form or other in almost every proceeding which is brought into it, either to commence a suit or on motions afterwards, and in most applications

bound to examine the record after being settled by the Registrar. In *Stoate* v. *Stoate*, 32 L. T. 394, the Judge Ordinary refused to admit evidence for the defence, which was not relevant to the issues before the jury, as the defence then intended to be set was not in any way averred on the record before the jury. A form of the record is given in the Appendix, page 77.

at chambers; and the consequence of an informal or scanty affidavit, or the absence of one when required has been that suits and motions have been considerably delayed, and needless expenses incurred to the suitors in addition. In *Hyatt* v. *Hyatt and another*, and in *Manton* v. *Manton*, 28 L. J. 32, the Judge Ordinary rejected two motions for want of affidavits of search of appearance. In each case there was such an affidavit in court, but his Lordship refused to take any notice of them, because in one case it was unstamped, and the other contained an interlineation in the jurat, contrary to rule 51; and on other occasions various motions have been rejected on account of similar informalities in affidavits. In *Evans* v. *Evans*, 28 L. J. 20, the affidavit was not considered to state sufficiently that the petitioner was unable to discover the co-respondent. For affidavits in common law actions, vide Chitty's Archbold's Practice, 10th Ed. Vol. II, p. 1541, &c.; and Sidney Smith's Practice in Chancery, under the heading of "Affidavits."

The affidavit must be made in the first person, and ought to state distinctly what facts or circumstances deposed to are within the deponent's own knowledge, and his own means of knowledge, and what facts or circumstances deposed to are known or believed by him, by reason of information derived from other sources than his own knowledge, and what such sources are. In one

case the Judge Ordinary wished it to be understood that if the contents of an affidavit were not satisfactory to him, he should require the maker of it to be examined orally in court.

Affidavits elsewhere, and we submit here also, ought to be divided into paragraphs, and every paragraph numbered consecutively, and, as nearly as may be, confined to a distinct portion of the subject. In *Suggate* v. *Suggate*, 27 L. J. 7, the Judge Ordinary complained of personal controversies being stated in the affidavits; and in *Hewetson* v. *Hewetson*, MSS., the affidavits and answer were considered unnecessarily long, as matters wholly immaterial were stated, the costs of which would not be allowed on taxation. The deponent signs his name at the end of the affidavit; but if he is unable to write, he may make his mark, and the jurat is varied accordingly.

In *Braham* v. *Christopher*, 11 Simon, 409, an affidavit was ordered to be taken off the file, because where a marksman had signed his name at length, his hand had been guided.

In the case of *Robotham* v. *Robotham*, MSS., where an affidavit had been signed before a notary public in New York the Judge Ordinary required another affidavit to assure him that a notary public in New York had authority to administer oaths. An affidavit is required in the New Court when a petitioner files his petition verifying the facts stated in it, rule 2; and another affidavit is

required when a petitioner seeks a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, stating that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage, rule 3 (*a*).

In case of the non-appearance of a respondent an affidavit to that effect should be filed before any application is made to the Court as to the mode of trial, *Wells* v. *Wells*, (in notes), 27 L. J. 54. So, also, when an appearance has been entered, it is necessary that that fact should be verified by an affidavit. Again, the affidavit must not be too old; for, in *Badcock* v. *Badcock and another*, in note 27 L. J., 54, the Judge Ordinary stated that the affidavit should be made shortly before an application to the Court, as was the practice required in analogous cases in the Common Law Courts, rules 35, 36, 37, H. T. 1853.

An affidavit must accompany an answer which contains any matter other than a simple denial

(*a*) Collusion and connivance may probably cause some difficulty, consequently we will briefly distinguish them. Collusion is held to be an agreement between two persons, for one to commit an act of adultery, so that the other may be enabled to obtain a remedy as for a real injury, implying that something must be done by the one colluding to carry out the collusion, whilst connivance has more of a passive signification, and may result from a tacit assent to the commission of the offence. See also "Digest," *post*.

of the facts stated in the petition, rule 15; *Tourle* v. *Tourle and another*, 27 L. J., 52, where the Judge Ordinary required an affidavit verifying each plea according to rule 15: and in cases involving a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the respondent must, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the deponent and the other party to the marriage, rule 16.

Before a petition for alimony can be commenced, an affidavit establishing the factum of a marriage between the parties must have been filed, rule 25.

In cases to be tried upon affidavits the petitioner and respondent must file their affidavits within eight days from the filing of the last proceeding, rule 35; and counter-affidavits to any facts stated in the last affidavits may be filed by either party within fifteen days from the filing of the affidavits which they are intended to answer, rule 36; and affidavits in reply to counter-affidavits may be filed by permission of the Judge Ordinary, granted on motion or summons, but not otherwise, rule 37.

Applications for a discharge of any order made to protect the earnings and property of the wife are to be founded on affidavit, rule 40.

No person shall be admitted to prosecute a suit *in formâ pauperis* without the order of the Judge Ordinary; and to obtain such order, the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party, or of his or her attorney, that the same case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying, that he or she is not worth £25, after payment of his or her just debts, save and except his or her wearing apparel, must be produced at the time such application is made, rule 43.

Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the Judge Ordinary, rule 47.

The addition and true place of abode of every person making an affidavit is to be inserted therein, rule 49.

In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat, and there must not be any interlineation or erasure in the jurat, rule 51; and no affidavit will be admitted in any matter depending in the Court for Divorce and Matrimonial Causes in which any material part is written on an erasure: rule 8, Second Rules and Regulations.

Where an affidavit is made by any person who

is blind, or who, from his or her signature, or otherwise, appears to be illiterate, the person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same; and that such party seemed to, and, according to the belief of such person did, understand the same; and also that the said party made his or her mark, or wrote his or her signature, in the presence of the person before whom the affidavit was made, rule 52.

No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a clerk of the proctor, solicitor, or attorney, rule 53. And a proctor, solicitor, or attorney respectively, if acting for any other proctor, solicitor, or attorney, is subject to the rules in respect to taking affidavits which are applicable to those in whose stead they are acting, rule 54.

Registrars, Surrogates, Commissioners for taking oaths in the Court of Chancery, and all other persons now or hereafter authorized to administer oaths under the Act 20 & 21 Victoria, chapter 77, or under the Act 21 & 22 Victoria, chapter 108 have power by section 12 of the last-mentioned act to administer oaths under the Act 20 & 21 Victoria, chapter 85.

Also in cases where it is necessary to obtain

affidavits, declarations, or affirmations, to be used in the Court for Divorce and Matrimonial Causes from persons residing in foreign parts out of her Majesty's dominions, the same may be sworn, declared, or affirmed before the persons empowered to administer oaths under the Act 6 George 4, chapter 87, or under the Act 18 & 19 Victoria, chapter 42; Provided that in places where there are no such persons as are mentioned in the said Acts, such affidavits, declarations, or affirmations may be made, declared, and affirmed before any foreign local magistrate or other person having authority to administer an oath there, 21 & 22 Vict. c. 108, s. 20.

Affidavits, declarations, and affirmations to be used in the Court for Divorce and Matrimonial Causes may be sworn and taken in Scotland, Ireland, the Isle of Man, the Channel Islands, or any colony, island, plantation, or place out of England under the dominion of Her Majesty, before any court, judge, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively; or, so far as relates to the Isle of Man and the Channel Islands, before any commissary, ecclesiastical judge, or surrogate, who at the time of the Act 20 & 21 Vict. chapter 77, was authorized to administer oaths in the Isle of Man or in the Channel Islands respectively; and all registrars and other officers of

the Court for Divorce and Matrimonial Causes shall take judicial notice of the seal or signature, as the case may be, of any such judge, notary public, or person, which shall be attached, suspended, or subscribed to any such affidavit, declaration, or affirmation, or to any other document, 21 & 22 Vict. c. 108, s. 21.

DEMURRER.

This is a proceeding to delay or put off (*demorari*) the opposite party, on the ground that although the circumstances of his case may be admitted to be quite true and correct, yet they do not constitute a legal grievance against the respondent, or a legal answer to the petitioner's prayer.

Mr. Stephen, in his last edition of Blackstone, vol. iii. p. 570, says, "if the matter the declaration contains appear on the face substantially insufficient in point of law to entitle the plaintiff to the redress he claims, the defendant's course is to demur (from demorari) importing that he denies the sufficiency, and will wait the judgment of the court whether he is bound to answer,"

At common law a demurrer must be in the form prescribed by 15 & 16 Vict. c. 76, s. 89.

Demurrers are also allowed, and are of not unfrequent occurrence in Chancery suits, but it would

seem doubtful whether they will be allowed in the Divorce and Matrimonial Court, for we find there is no mention made of them in either of the Acts, nor is there any form given for them in the First Rules and Orders of Hilary Term, 1858, or in the Second Rules and Regulations; and in *Evans* v. *Evans*, 6 W. R. 356, the Judge Ordinary, in answer to certain observations of the Queen's Advocate, was of opinion that under the act and rules there is no power to move the court to dismiss, or to take any step answering to a demurrer; but that a responsive plea must be given in. There is one case, however, now before the court, in which the petitioner has demurred to the respondent's answer. The more usual way hitherto has been to apply to the court to order certain paragraphs to be altered and amended, or for leave to amend, if the application comes from the party at fault. *Allen* v. *Allen and D'Arcy*, 5 Jur. 128.

MOTIONS.

A motion is an application made to the Judge Ordinary, or to the judges of the full court, in open court; and, at common law, it may be either incidental to an action, or it may be wholly unconnected with one.

In the superior courts it can be made by none but a counsel or barrister: 3 Stephen's Blackstone,

last edition, 695; and the Judge Ordinary in *Drake and another* v. *Morgan*, 27 L. J. p. 3, said, that all motions which must be made in court should be made by counsel, so that this Court may conform to the practice of the other courts sitting at Westminster.

The most frequent motions which have so far occurred have been made to the Judge Ordinary, in order to obtain his consent to substituting service on the attorney, or on some relative of the respondent, *Robotham* v. *Robotham*, 27 L. J. 33; 6 W. R. 328; or to dispense with service on the co-respondent, *Tomkin* v. *Tomkin*, 27 L. J. 54, *Hook* v. *Hook*, 6 W. R. 868; or inquiries as to how the case should be tried, whether by oral evidence, *Pearce* v. *Pearce*, 27 L. J. 51, or even requesting to have it tried upon affidavit, *Ling* v. *Ling and Croker*, 27 L. J. 58; *Armitage* v. *Armitage and McDonald*, 27 L. J. 50; *Potts* v. *Potts and another*, 6 W. R. 860; 27 L. J. 59.

Motions are also made for leave to amend, *Wright* v. *Wright*, 1 S. & T. 80, 31 L. T. 370, 27 L. J. 32: for attachment in case the respondent fails or refuses to comply with the order of the court, *Oates* v. *Oates*, MSS.: for a rule nisi, 21 & 22 Vict. c. 108, s. 18: and, in fact, for any proceeding necessary or incidental to a trial.

There must generally be three days' notice given, to the opposite party before a motion is made; and

the time, by the Second Rules and Regulations, or by former rules and regulations made under the provisions of 20 & 21 Vict. c. 85, for bringing in petitions, answers, and pleadings, or for any other proceeding in a cause depending in the Court for Divorce and Matrimonial Causes, shall, in all cases, be exclusive of Sundays.

CHAPTER III.

NOTICES TO ADMIT OR TO PRODUCE.

Since the rules of evidence observed in the Superior Courts of Common Law at Westminster are applicable to and observed (20 & 21 Vict. c. 85, s. 48) in the trial of all questions of fact in the court, it will of necessity occur at times that certain documents, letters, and other papers will be required at the trial, and, consequently, a notice should be given to the opposite party, either to admit or to produce the same according to whose possession they happen to be in.

In such cases the notice must, rule 48, be in writing, signed by the party, or by his or her proctor, solicitor, or attorney; and by rule 32, the petitioner or respondent may call upon the other party, by notice in writing, to admit any documents, saving any just exceptions; and in case of refusal or neglect to admit the same,

the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the Judge Ordinary shall certify that the refusal to admit was reasonable; and when such notice to admit has not been given, no costs of proving any document shall be given, except in cases where the omission to give the notice is, in the opinion of the registrar, a saving of expense. By the Common Law Procedure Act, 1852, s. 118, an affidavit of the attorney in the cause, or his clerk, of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions; and by s. 119 an affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served. And it is submitted that such notice will be sufficient to let in secondary evidence in this court, provided the opposite party refuses or neglects to produce, &c.

The notice should, of course, accurately describe the documents, letters, &c.; but we refer the practitioner to Chitty's Forms, 7th ed. 152 to 161, and Chitty's Archbold's Practice, by

Prentice, 9th ed., 292 to 298, for fuller information on these points.

Forms of notice to admit and to produce will be found in the Appendix, p. 76.

EVIDENCE.

By 20 & 21 Vict. c. 85, s. 48, the rules of evidence observed in the Superior Courts of Common Law at Westminster, shall be applicable to and observed in the trial of all questions of fact in the court; but by s. 22 of the same Act, in all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act. And 21 & 22 Vict. c. 108, s. 5, enacts that in every cause in which a sentence of divorce and separation from bed, board, and mutual cohabitation has been given by a competent Ecclesiastical Court before the Act of the twentieth and twenty-first Victoria, chapter eighty-five, came into operation, the evidence in the case in which such sentence was pronounced in such Ecclesiastical court may, wherever from the death of a witness or from any

other cause it may appear to the court reasonable and proper, be received on the hearing of any petition which may be presented to the said Court for Divorce and Matrimonial Causes.

In *Evans* v. *Evans and Robinson* the depositions of a witness examined in *Evans* v. *Evans* before the Arches Court, but since deceased, were admitted by Mr. Baron Martin, on Mr. Edwin James urging their reception, but subject to any appeal against the same.

Since this court is to observe the rules applicable to, and observed by, the superior Courts of Common Law, it may perhaps seem unnecessary to remark that one witness is now sufficient where in the Ecclesiastical Courts two were required to prove a fact; or rather, one to prove it, and another to confirm it by collateral evidence.

In *Studdy* v. *Studdy*, MSS., the Judge Ordinary held that an affidavit is not to be reverted to unless it is intended to put it into evidence.

The Act allows affidavits to be used to verify a cause in whole or in part, but that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the court, be subject to be cross-examined by or on behalf of the opposite party orally in open court; and after such cross-examination may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed,

20 & 21 Vict. c. 85, s. 46; but the preliminary affidavits are not admissible as evidence, *Dean* v. *Dean*, 4 Jur. N. S. 268.

What is or is not admissible evidence will be found under the heading of "Witnesses," and in the "Digest of Evidence," *post*. We shall here merely remark that no party to the cause could give evidence for or against another in the same cause, unless he or she had been first dismissed from the cause, *Robinson* v. *Robinson and Lane*, 27 L. J. 91: but now where, on the petition of the husband for a divorce, the alleged adulterer is a co-respondent, or where, on the petition of the wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the Court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her, 21 & 22 Vict. c. 108, s. 11; which was done in the above cause, and the respondent on his evidence was also dismissed from the same cause.

And consequently where the wife was the petitioner in a suit for divorce either on the ground of adultery coupled with two years of continual desertion, or with cruelty, she was not allowed to prove the desertion by being called as a witness to that fact, *Pyne* v. *Pyne*, 27 L. J. 54.

The disability to call her as a witness to the facts of continual desertion, or to the fact of cruelty in cases where the wife sought a dissolution of marriage on the ground of the adultery of her husband, coupled with cruelty or desertion was found a great hardship and an almost insuperable difficulty in many cases; and this rule of evidence, and likewise that of not allowing either party to give evidence in actions of breach of promise of marriage is strongly complained of in Taylor on Evidence, 2nd ed., 2, 1052; however, so far as concerns divorce suits, the difficulty is now obviated by the last Divorce Amendment Act; for on any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having committed adultery coupled with cruelty, or adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion, 22 & 23 Vict. c. 61, s. 6; and should either of them wilfully depose or affirm falsely in any proceeding before the Court, they will be deemed guilty of perjury, and be liable to the pains and penalties attached thereto, by 20 & 21 Vict. c. 85, s. 50. See Roscoe's Digest Ev. Crim. Ca. 4th ed., 793, title "Perjury."

The Court may also, if it think fit so to do, order the attendance of the petitioner, and as to all matters whatsoever may examine him or

her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery 20 & 21 Vict. c. 85, s. 43; and the court may, from time to time, adjourn the hearing of any such petition, and may require further evidence thereon, if it shall see fit so to do. *Astrope* v. *Astrope*, not yet reported, was a case of this kind, and now stands adjourned for further evidence on the fact of desertion; in which case, however, the court refused to exercise the discretion invested in it by 20 & 21 Vict. c. 85, s. 43.

As evidence is a subject on which volumes may be, and have been written, we shall simply refer those desirous of extending their research to the books of Mr. Taylor, Mr. Phillips, and Mr Best.

In case the evidence of a witness about to go abroad is required, issue must be joined before such evidence can be taken, *Macdonell* v. *Macdonell*, MSS.

A bigamous marriage in America was not allowed to be proved by an affidavit, *Pritchard* v. *Pritchard*, MSS.; *Deck* v. *Deck*, MSS.; nor even by a certificate of a conviction of that crime, *March* v. *March* 28 L. J. 30, probably on account of the decision in *Horne* v. *Horne*, 27 L. J. 50, where it was held that some evidence of cohabi-

tation must be given in addition to the solemnization of the second marriage.

The evidence in such cases may be obtained, though at a much greater expense, by applying for a commission to examine witnesses abroad,; on which subject more will be found under the heading of "Witnesses."

Affiliation orders signed by magistrates have been refused to be admitted in evidence, and protection orders for desertion so signed, &c., will most probably be similarly refused.

TRIAL.

There are six ways of trying a cause in this court. Either before the Judge Ordinary with a jury; or before the Judge Ordinary without a jury, by oral evidence; or, in some cases, before the Judge Ordinary upon affidavit; or (in cases seeking a decree for a dissolution of marriage, or for a decree of nullity of marriage), before the full court (which must, as we have before said, when treating of the full court, consist of at least three judges) with a jury; or by oral evidence before the full court without a jury; or before the full court upon affidavit.

We will, therefore, point out what sections of the Acts apply to the trial, and what rules have been as yet laid down, so as to enable a practitioner to have some idea of how a cause

will be tried: and in another heading, viz., that of "Witnesses," we shall point out who can and will be allowed to prove it. Evidence will be found under the heading of "Evidence" in the Practice; and more fully in the "Digest of Evidence" accompanying the Practice; where, under ground for bringing a petition, will be found cases supporting it, and also cases for answering and defending it.

By 20 & 21 Vict. c. 85. s. 28, the petitioner, or adulterer, as co-respondent, and the wife, when petitioning, or the alleged adulteress, if cited, or either respondent, in fact any party to the cause, may insist on having the contested matters of fact tried by a jury. In *Marchmont* v. *Marchmont*, 6 W. R. 870, however, the Judge Ordinary stated that on comparing this section with the 36th section, "I do not think you can, in a petition for judicial separation, demand a jury as a matter of right; but I am much inclined to order a jury whenever either party asks it."

By rule 30, when the proceedings have raised the questions of fact necessary to be determined, either party may, within fifteen days from the filing of the last proceeding, apply to the Judge Ordinary to direct the truth of any question of fact arising in the proceedings to be tried by a jury; and if neither party claim that the cause shall be heard before a jury, the Judge Ordinary, rule 21, shall determine whether the same shall

be tried by a jury, or before the court itself, and whether by oral evidence, or upon affidavit; and, in cases where a husband intends to claim damages, a jury will, by 20 & 21 Vict. c. 85, s. 33, be necessary; for it enacts that the claim made by every such petitioner shall be heard and tried on the same principles, and in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation were tried and decided in courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment: and the damages to be recovered on any such petition shall, in all cases, be ascertained by the verdict of a jury, although the respondents, or either of them, may not appear. In *Read* v. *Read and Davis*, MSS., the adulterer did not appear, and it was ordered that the cause be tried by a jury.

Section 36 enacts that in questions of fact arising in proceedings under the Act constituting the new court, it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the said court, by the verdict of a special or common jury, *Marchmont* v *Marchmont*, 27 L. J. 59, 6 W. R. 870; and when such question,

is ordered to be tried by a jury, a jury may be summoned as in the superior common law courts, sect. 37, and be liable to be challenged by any of the parties to the cause: moreover, by sect. 40, it shall be lawful for the Court to direct one or more issues to be tried in any Court of Common Law, and either before a judge of assize in any county or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is done by the Court of Chancery.

Whenever a case is to be tried before a jury, the Judge Ordinary shall direct, rule 22, the questions at issue to be stated in the form of a record to be settled by one of the Registrars: but, as we have pointed out under the heading of "Amendments," this record, after being so settled, may be amended, rule 23; after which the petitioner shall file the record, rule 24; and set down the cause as ready for trial; and on the day on which it is set down shall give notice of his or her having done so to each party for whom an appearance has been entered. And if the petitioner delay filing the record, and setting down the cause as ready for trial, for the space of one month from the day on which the record was finally settled, the respondent may file the record and set the cause down as ready for trial, and give a similar notice to the petitioner and the other parties. A copy of every such notice shall

notice shall be filed in the registry, and the cause, unless the Judge Ordinary shall otherwise direct, shall come on in its turn.

It will thus be seen that all matters of fact may be expected to be allowed to be tried before a jury, although, as before shown, the Judge Ordinary in *Marchmont* v. *Marchmont*, threw doubt upon whether, in a judicial separation, a jury could be demanded; that an issue or issues may be sent into a common law court to be tried before a special or common jury; and that when the petitioner claims damages they must be ascertained in all cases by the verdict of a jury.

There have been numbers of cases, however, where a jury has not been impanneled, and from *Norris* v. *Norris and Gyles*, 27 L. J. 51, and notes thereto, it will be seen that generally the mode in which the petitioner for a dissolution of marriage will be directed to prove his or her petition when no answer has been filed, and twenty-one days have elapsed, as required by rule 14, is by oral evidence before the full court without a jury, *Pearce* v. *Pearce*, 27 L. J. 51, note; also in judicial separations, L. T.: a few cases have been tried upon affidavits, *Armitage* v. *Armitage*, *Ling* v. *Ling*, 27 L. J. 58, *March* v. *March*, 28 L. J. 30; and in a case where impotency was alleged: but in ordinary cases, *Potts* v. *Potts*, 27 L. J. 59, oral evidence with or without

a jury, may beg enerally expected to be ordered; for in *Norris* v. *Norris and Gyles*, 27 L. J. 51, the Judge Ordinary held that there may be cases in which it would not be desirable that the evidence should be given orally in court: but, except in cases in which some strong reason can be shown against having recourse to that mode of trial, his Lordship thought it would be better that oral evidence should be required: also in *Cooke* v. *Cooke and Quayle*, the Judge Ordinary ordered the case to be tried on oral evidence, observing that it was a very wholesome rule to have oral evidence; in *Rylance* v. *Rylance and Jones*, *Mills* v. *Mills*, *Walton* v. *Walton and Hibbert*, 28 L. J. 31, notes, oral evidence was in each case required.

No cause is to be called on for hearing or trial until after the expiration of ten days from the day when the same has been set down as ready for hearing or trial, and notice thereof has been given, save with consent of all parties to the suit, rule 4, Second Rules and Regulations; and Sunday is not to be counted for one day, rule 5, Second Rules and Regulations.

It sometimes becomes a question of considerable importance as to which side has the right to begin; for if evidence is adduced on the other side, the side which commenced has the right to reply. And the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party

who begins his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case and also to sum up the evidence (if any); and the right to reply shall be the same as at present, Com. Law Proc. Act, 1854, s. 18.

The right to begin is on that side which has to prove the affirmative issue, *Cherry* v. *Cherry*, 32 L. T. 198; *Mercer* v. *Whall*, 5 Q. B. 462: and the counsel for the respondent is entitled to address the court before the counsel for the co-respondent, but this may be varied by agreement; but then the counsel for the respondent is not allowed to cross examine the witnesses for the co-respondent, *Robinson* v. *Robinson and Lane*, 31 L. J. 268. Counsel cannot compromise so as to prevent the opposite party from re-opening the case. In *Hayward* v. *Hayward*, 32 L. J. 262, the Judge Ordinary said, "I think whatever arrangements may have been made between the parties, as the cause is still on the books, and the petition has not been dismissed, I ought to hear it; in cases of this sort I much doubt whether the court can sanction or consider any agreement between the parties." *Vide* also *Studdy* v. *Studdy*, 5 Jur. 22.

WITNESSES.

Previous to commencing any cause or suit, one most necessary and important question arises, as to how and by what means the facts relied upon as being sufficient in point of law are to be proved, so as to convince a jury or the judge. In this court the judge or judges can try and decide upon questions of fact, 20 & 21 Vict. c. 85, ss. 28, 29 ; *Norris* v. *Norris and Gyles*, 6 W. R. 640 ; *Ling* v. *Ling and Croker*, 6 W. R. 736 ; 31 L. T. 268.

When the trial is to be on oral evidence, with or without a jury, the question of who may or may not be witnesses necessarily arises ; however, that difficulty has been greatly reduced of late years by the stat. 6 & 7 Vict. c. 85, c. 1, by which no person offered as a witness shall be excluded by reason of incapacity, from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding civil or criminal, in any court. By 14 & 15 Vict. c. 99, s. 2, parties to suits, actions, or other proceedings in courts of justice, are made competent and compellable to give evidence for or against each other ; however, parties to any action, either

for breach of promise of marriage, and to any suit in the Ecclesiastical Court, instituted by reason of adultery, are still excepted; Taylor on Evidence, 13th ed., vol. ii. 1052; *Pyne* v. *Pyne*, 27 L. J. 54, 1 S & T. 80.

By 21 & 22 Vict. c. 108, s. 11, in all cases now pending, or hereafter to be commenced, in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the court after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her, *Lane* v. *Lane and Robinson*, 27 L. J. 91.

The petitioner is eligible as a witness in this court in any cause in which adultery is not alleged; and in a cause for judicial separation on the ground of desertion for two years and upwards is the best witness: but, then, it is better that she should be corroborated by other evidence. At present it seems an open question, whether a wife seeking a divorce on the ground of adultery and desertion would be allowed first to obtain a judicial separation on the ground of desertion, in which, as before stated, she can be a witness, and then proceeding for a divorce, prove the desertion

by the record of the judicial separation and the adultery *aliunde*; in one early case his lordship in an *obiter dictum* stated that having obtained a judicial separation was no bar to afterwards proceeding for a divorce, should evidence of adultery afterwards be adduced.

An idiot is not allowed to give evidence, Coke Litt. 67, Gilbert on Ev. 144; but a lunatic during a lucid interval may; but, when tendered as a witness, it is for the judge to examine and ascertain whether he is of competent understanding to give evidence, and is aware of the nature and obligation of an oath; and if satisfied that he is, the judge should allow him to be sworn and examined: *Reg.* v. *Hill*, 2 Den. C. C. 255. A deaf and dumb person is not incompetent, for he may be examined through the medium of a sworn interpreter, who understands his signs. A dumb man, not deaf, is sworn in the usual way, and there the interpreter is sworn to interpret his signs, 1 Phillips' Evidence, 7. An infant may be a witness, if such infant appear to understand sufficiently the nature and moral obligation of an oath: *R.* v. *Williams*, 7 C. & P. 320.

•When a witness is out of the jurisdiction of the court, or where, by reason of his or her illness or from other circumstances, the Court shall not think fit to enforce the attendance of the witness in open court, it shall be awful for the Court to order a commission to issue for the examination

of such witness on oath, upon interrogatories or otherwise; or if the witness be within the jurisdiction of the court, to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said court, or other person to be named for the purpose, 20 & 21 Vict. c. 85, s. 47. And in accordance with this section of the Act there have been many commissions granted on motions in open court for the purpose of obtaining evidence from witnesses abroad, or from those just about to go abroad, &c. To obtain one, however, an affidavit or affidavits will be required.

CHAPTER IV.

DAMAGES.

Although the 20 & 21 Vict. c. 85, s. 59, has apparently put an end to the action of *crim. con.* hitherto preliminary to obtaining a parliamentary divorce, it has still left the aggrieved husband a similar claim upon the adulterer; for by sect. 33, any husband may, either in a petition for a dissolution of marriage or for judicial separation, or in *a petition limited to such object only*, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served

on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as those by which actions for *crim. con.* were tried and decided in courts of common law; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents, or either of them, may not appear; and after the verdict has been given, the Court has power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

This section was not much resorted to at first; however, there have latterly been several causes in which damages have been claimed and decreed, *Reed* v. *Reed and Davis,* MSS.; where the co-respondent was ordered to pay the costs of the cause and 20*l.* (the co-respondent only being a railway porter), which the court ordered to be invested for the benefit of the petitioner's child: In *Keats* v. *Keats and Montezuma,* 5 Jur. 179, 1000*l.* was decreed to be appropriated in various ways.

It will be seen that although the action of

crim. con. was abolished by sec. 29, yet nevertheless sec. 33 leaves a similar remedy or revenge; for by it, "Any husband may, either in a petition for dissolution of marriage or for judicial separation, *or in a petition limited to such object only*, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner."

As yet this latter clause does not appear to have been acted upon.

MARRIAGE SETTLEMENTS.

In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them, 20 & 21 Vict. c. 85, s. 45. By this section it would almost appear that there is the discretion invested in the Court to interfere with marriage or other settlements of the wife's, if she be proved guilty of adultery, and divorced in consequence of it; however, the Court, in *Tourle* v. *Tourle*, 27 L. J. 73, note, refused to make any

order as to the marriage settlements, Lord Campbell, C. J. stating that they had considered the point, and were of opinion that they had no power to alter marriage settlements. In *Norris and Norris* v. *Gyles*, 27 L. J. 73 a similar opinion was expressed. In *Keats* v. *Keats and Montezuma*, Lord Chelmsford held that the marriage settlement must remain untouched, for the Court merely provides for the wife during her life, and intimated that if the wife chose to give up certain disposing power vested in her, the husband must allow her a certain income for her life, *et quam diu casta vixerit.*

The Court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable. It will be seen from the last section that the Court has the power on any decree of divorce to order the husband to settle such a sum as may enable his erring wife to live; but from the judgment in *Keats* v. *Keats and Montezuma*, the inference is that it will only last *quam diu casta vixerit.*

CUSTODY OF CHILDREN.

In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceeding; and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery, 20 & 21 Vict. c. 85, s. 35. In *Curtis* v. *Curtis*, 27 L. J. 16, an interim order was made that the children should remain in the custody of their mother for three months; and it was decided also, on a further hearing, that, when an order for the custody of children is prayed for, that question must be gone into during the cause and before the final decree, *Curtis* v. *Curtis*, 27 L. J. 73. In *Robotham* v. *Robotham*, 27 L. J. 61, an order was refused on the ground that the husband was in America and not likely to interfere with them.

There was a similar refusal in *Seymour* v. *Seymour*, 7 W. R. 296, but not on the ground that there was no mention of them in the prayer, as reported,

for their custody, &c.; such was in the prayer, and it was also argued by counsel, as the husband was expected, and moreover, appeared within a few days of the decree. In *Marsh* v. *Marsh*, 28 L. J. 13, the Court held that it has a discretionary power exceeding that possessed by Courts of Common Law and Equity, and should, in exercising it, make such orders as are just and proper with reference to the circumstances affecting the cause, taking into consideration the interests both of the children and parents.

A child in the custody of a third person who was considered to lean more towards one parent than the other, was ordered to be delivered up to the custody of its paternal grandmother, *Boynton* v. *Boynton*, 7 W. R. 181. Other orders of the Court will be found in *Spratt* v. *Spratt*, 6 W. R. 860, 31 L. J. 269; *Hooke* v. *Hooke*, MSS.; *Tarbuck* v. *Tarbuck*, 27 L. J., 62 note. It must be remembered that, at Common Law, the father was entitled to the custody of all his children, although within the age of nurture; but by 2 & 3 Vict. c. 102, it was enacted that it should be lawful for the Court of Chancery to make an order that infants under the age of seven years should be delivered to, and remain in their mother's custody until the age of seven; and when they have attained that age, the Court of Chancery is empowered to make an order giving the mother access to them occasionally: if they have exceeded

or attained the age of fourteen, they may exercise their own discretion.

ALIMONY.

Alimony is the wife's allowance, made to enable her to support and maintain herself, either during the proceedings of a matrimonial cause, then technically termed alimony *pendente lite;* or at its conclusion, and then termed permanent alimony.

It is a term borrowed from the old Ecclesiastical Law, still forms an important, if not perhaps the most important part of a cause for judicial separation or divorce at the present time; and has necessarily been repeatedly brought under the notice of the present Court for Divorce and Matrimonial Causes.

Mode of Action.

For a wife to entitle herself to alimony *pendente lite*, she must first prove the factum of a marriage by filing an affidavit; and after the husband has appeared, she may proceed to file a petition for it, and serve a copy of the petition on her husband, or on his proctor, solicitor, or attorney, on the same day, rule 25: then, providing her husband has filed his answer thereto, upon oath within eight days after the filing of his wife's petition, she may move the Court at its next sitting to decree her alimony *pendente lite*, provided that she, previous to moving the Court,

has given at least two days' notice to her husband, or to his proctor, solicitor, or attorney, of her intention so to do, rule 28: and in case the wife should not be satisfied with her husband's answer, she may, but subject to any order as to costs, examine witnesses in support of her petition, rule 27. In one case, not yet reported, in which this occurred, the Judge Ordinary intimated that some notice ought to have been given to the husband; but as he appeared to be present in court, the examination was allowed to be proceeded with, *Hooke* v. *Hooke*, MSS.

Alimony may be ordered to be paid monthly, *Godman* v. *Godman*, MSS.; but, as before stated, care should be taken to petition for it before the decree for divorce or separation is made, *Sykes* v. *Sykes*, MSS. Alimony *pendente lite* is not granted in cases where the husband has not entered an appearance. In *Tomkins* v. *Tomkins*, 6 W. R. 545, the Judge Ordinary granted a fifth of the husband's net income *pendente lite*, observing that where the husband had appeared he found no difficulty in granting alimony *pendente lite;* but in cases where the husband had not appeared, he did not think he had power to grant it, as rule 25 appeared to be intended to prevent any such application; vide also *Deane* v. *Deane*, 28 L. J. 23, 30 L. T. 270. The Judge Ordinary also allowed the expense of ordinary current repairs, but not extraordinary and permanent improvements, to be deducted from the husband's income derived

from real property, and granted one-fifth as fair alimony *pendente lite*, observing that alimony is generally due from the return of the citation, *Hayward* v. *Hayward*, 6 W. R. 639, 1 S. & T. 85; nor is it allowed where the wife has been proved guilty of adultery by a competent tribunal, *Holt* v. *Holt*, 28 L. J. 12.

For permanent alimony it has been usual in the old Ecclesiastical Courts to allow about one-third of the husband's income *Cooke* v. *Cooke*, 2 Phillimore, 44. In *Deane* v. *Deane*, 1 S. & T. 90, which was a suit for judicial separation, upon application for alimony, and it appearing that there were eight children, none of whom were with the husband, the Judge Ordinary decreed a moiety of the husband's income. It may be here mentioned that when alimony is ordered by the Judge Ordinary, either party dissatisfied with the amount, has, 20 and 21 Vict. c. 85. s. 55, a right to appeal within three months to the Full Court, whose decision in this as in all other appeals against any decrees made by the Judge Ordinary alone will be final.

Should there be a considerable alteration of circumstances on either side, the old Ecclesiastical Courts would, if the alterations were clearly proved, make a reduction in the sum heretofore decreed as permanent alimony. And the new Court, doubtless, will do the same, provided a sufficient case is made out; for in *Saunders* v. *Saunders*, 6 W. R. 328, 1 S. & T. 72, the Judge

Ordinary said: "I think that no sufficient case is made out to induce me to order a reduction of alimony. There are no facts before me to make me think that this alimony would be unreasonable, if the wife had then been in possession of the income which she admits she receives from her father's estate." Also in *Shirley* v. *Wardrop*, f. c. h. *Shirley*, 32 L. T. 198.

More cases will be found cited in the "Digest of Evidence," on this subject, under the heading of "Alimony,"

A form of a petition for Alimony will be found in the Appendix, on page lxxvii.

CHAPTER V.

APPEAL.

The decrees of either branch of the Court for Divorce and Matrimonial causes, are almost always subject to an appeal either to the Court above, or finally to the House of Lords.

We will first point out what appeals can be made to the Judge Ordinary. Formerly, Judges of Assize had power to give decrees in petitions for restitution of conjugal rights, and for judicial separations, 20 & 21 Vict. c. 85, s. 17, and if that power had been exercised, and either party had been dissatisfied with the orders thereon, they

might have appealed, 20 & 21 Vict. c. 85, s. 20: however, these sections of the Act constituting the Court for Divorce and Matrimonial Causes, have been expressly repealed 21 & 22 Vict. c. 108, s. 19.

Protection orders granted to wives deserted by their husbands are also subject to appeal, either when granted by the Judge Ordinary, sitting in Chambers, rules 39, 40, or by a police magistrate; or by justices at petty sessions, 20 & 21 Vict. c. 85, s. 21; provided always, that every such order, if made by a police magistrate, or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the county court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof; and these applications if made to the Court for Divorce and Matrimonial Causes, must be founded on affidavit, rule 40.

With regard to appeal against the decisions of the Judge Ordinary, either party dissatisfied with any decision of the Court, in any matter which, according to the provisions aforesaid, may be made to the Judge Ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the full Court,

whose decision shall be final 20 & 21 Vict. c. 85, s. 55; *Curtis* v. *Curtis*, 28 L. J. 8, where it was held *per curiam*, that the petitioner, having filed a petition of appeal,(*a*) and given notice of appeal to the respondent, the case will be set down for hearing, when the facts of the cause will not be reheard, but, in analogy to the practice of the Ecclesiastical Court, on appeal from the Court of first instance, the facts must be taken to be those proved in the Court appealed from, and in the Court for Divorce and Matrimonial Causes they will be assumed to be those appearing on the notes of the Judge Ordinary, and for a reversal of the former decree, it must be successfully contended that those facts did not warrant the decree, which was not done either in this instance of appeal, nor in that of *Curtis* v. *Curtis*, 28 L. J. 8, nor yet in *Keats* v. *Keats and Montezuma*, 7 W. R. 377.

Again, either party dissatisfied with the decision of the full Court on any petition for the dissolution of a marriage, may, within three months after the pronouncing thereof, appeal therefrom to the House of Lords, if Parliament be then sitting, or, if Parliament be not sitting at the end of such three months, then within fourteen days next after its meeting; and on the hearing of such

(*a*) Every application for a new trial in respect of causes tried before a jury, is to be lodged in the Registry within a month from the day on which a cause was tried rule 41.

Keeping company with a stranger privately, raises the strongest presumption against the wife; and where there are, in addition to that clandestinity, other circumstances in proof, the Court can have no doubt, *Rix* v. *Rix*. 3 Hagg. 74. The fact of a correspondence being kept up between a married lady and a gentleman, unknown to the husband, is of itself highly suspicious; and where the lady was in the habit of getting the letter bag before it was produced to her husband, or anybody else, and also put letters directed to the same gentleman into the post herself, it leads to conclusions even more unfavourable, *Loveden* v. *Loveden*, 2 Hagg. Con. 20.

Where there were no personal familiarities proved except two kisses, and there was a correspondence between the parties containing passages of much suspicion, though no unequivocal reference to nor inference of any act of adultery committed, and there was no oral evidence establishing the commission of the offence, and no occasion could be pointed out when adultery was actually committed, this was held not sufficient proof, *Hamerton* v. *Hamerton*, 2 Hagg, 21; but in this case there were circumstances in the character of the alleged adulterer which induced the Court to think that there would have been allusions to past criminality, if any such existed.

The Court does not judge from mere impru-

dence; but there are kinds and degrees of imprudence; and there are degrees from which a court of justice will infer guilt, *Chambers* v. *Chambers*, 1 Hagg. Con. 444 The Court will not be duped, but will judge of facts as other men of discernment exercising a sober judgment, *Ibid*, 445. When an improper attachment is admitted to have existed, and indelicate acts have passed between the parties when within reach of observation, the Court will hold that adultery has been committed, on proof that there have been opportunities of effecting it, *Loveden* v. *Loveden*, 2 Hagg. Con. 19. The facts are not to be taken separately only, but in conjunction: they mutually intepret each other: their constant repetition gives them a determinate character: and, such habits continuing to be preserved in public, it is to be inferred that the parties would go greater lengths if opportunities of privacy occurred: with such opportunities they advance to the footing of proximate acts; and if the privacy be shown to be frequent, the Court will infer the commission of crime, *Burgess* v. *Burgess*, 2 Hagg. Con. 229: but there must be some overt acts, or some circumstances to show that the parties were disposed to avail themselves of the opportunity, *Harris* v. *Harris*, 2 Hagg. 379.

The Court would not be warranted in drawing a conclusion of criminality when the facts are

capable of a construction of innocence, *Hamerton* v. *Hamerton*, 2 Hagg. 23.

Adultery may be inferred from circumstances, from the conduct of the wife, and of the person with whom it is alleged to have been committed, and from letters; although direct proof entirely fails. *Grant* v. *Grant*, 2 Curt. 16.

If a charge be of habit and constant practice it is as easy to disprove as to prove it. The defendant may cross-examine the plaintiff's witnesses, and call his own to prove that there was nothing to raise a surmise of anything improper, *Mortimer* v. *Mortimer*, 2 Hagg. Con 314.

If the adultery is alleged to have taken place during a long space of time, in which a constant and habitual adulterous intercourse took place, that is sufficient without alleging specific facts. If, however, the intercourse was limited, or of short duration, then the facts must be specifically pleaded, *Graves* v. *Graves*, 3 Curt. 241.

By 20 & 21 Vict. c. 85, s. 48, the Common Law rules of evidence are applied to this Court, and one witness (corroborated, if possible in some material point) is sufficient; and by 14 & 15 Vict. c. 99, s. 4, the evidence of the husband or wife, either being a party to the suit was not admissible against each other in cases of adultery; but now if adultery is coupled with cruelty or desertion, they are respectively compellable to prove such cruelty or desertion, 22 & 23 Vict. c. 61. s. 6. The Court

may, however, in all cases, if they think fit, examine the petitioner.

We may here observe that where the other party to the adultery is not a co-respondent, he or she is tainted with all the suspicion attaching both in the courts of common law, and the old Ecclesiastical Court to a witness who is an accomplice, see *Evans* v. *Evans*, 1 Rob. 165, s. c. 3. No. Ca. 416, 1 Phill. Evid. 36, 9th edit.; *Simmons* v. *Simmons*, 5 No. Ca. 342. And in *Stapleton* v. *Staplaton*, MSS., where the sole evidence of adultery, with very little corroborative evidence of proximate facts, was a prostitute with whom the respondent had slept, she knowing that he was a married man, Cresswell, J. O., left the case to the jury, who found for the petitioner.

Evidence where the Husband petitions against the Wife on the ground of Adultery.—This, as we have said before, is a ground of dissolution of marriage, and the petition must be addressed to "The Full Court," see *ante*, "Practice," page 2.

In a suit for dissolution of a marriage on the ground of the wife's adultery, the husband should call a witness to show that he treated his wife with propriety and took care of her, *Boddington* v. *Boddington and Nossiter*, 27 L. J. P. & M. 53. If there be full proof of identity and of the birth of a child during the husband's absence abroad,

so as to preclude access, it is all that is necessary, *Richardson* v. *Richardson*, 1 Hagg. 11 ; *Caton* v. *Caton*, 7 No. Ca. 27.

Where a young woman away from her husband, and a young officer were constantly together, and lived in the same house, but with separate beds, the Court (Lord Stowell) said separation might justly follow from this alone ; and that this may be the legal proof from which the Court will presume guilt. That a Court should not put upon such an intimacy the construction that every one else would do, would be monstrous, *Chambers* v. *Chambers*, 1 Hagg. Con. 445.

Where a gentleman slept in the house, but had a separate room, and the witnesses to that part of the case had never observed any indecent familiarities, it was strongly held in the Court of Delegates that general cohabitation excludes the necessity of proof of particular facts, *Rutton* v. *Rutton*, Deleg. 14 Nov. 1799, quoted in *Loveden* v. *Loveden*, 2 Hagg. Con. 6 (note). Where the parties retired into Wales ; but the man slept at an inn, but spent his time at the house, the Court said, here are the wife of another husband and the husband of another wife retiring together and shutting out all witnesses. Can it be necessary that the Court should require any other evidence than this ? Mere cohabitation in this way must be held sufficient to found the judgment

conclusively. Finding persons together in such a position as presumes guilt *generally*, the Court must presume it in all cases attended with these circumstances. It cannot adopt the extravagant professions of Platonism for the principles of its decisions, *Cadogan* v. *Cadogan*, Consist. 1796, quoted in *Loveden* v. *Loveden*, 2 Hagg. Con. 4 (note).

Where the lady charged hung back from the rest of a party at a pic-nic, and was afterwards seen by the witness reclining on a bank with the arm of a gentleman round her, to whom she had an avowed attachment, and they were whispering together, whereupon the witness begged her to come away, but she remained behind, it was held that it would be difficult to have further proof of a fact of adultery; for, after they were left, they had quite ample opportunity of committing an act of adultery if they were so inclined; the adultery had almost commenced when the witness left the scene, *Harris* v. *Harris*, 2 Hagg, 395.

The fact of a woman going to a brothel with a man is conclusive evidence as against her of adultery: *Eliot* v. *Eliot*, Arches, 23rd Feb. 1776, quoted in *Williams* v. *Williams*, 1 Hagg. C. 302; see also *Loveden* v. *Loveden*, 2 Hagg. Con. 25; *Timmings* v. *Timmings*, (note b), 3 Hagg. 82; *Astley* v. *Astley*, 1 Hagg. 719; *Kenrick* v. *Kenrick*, 4 Hagg. 138.

Where a married woman visited an unmarried man at his lodgings, not calling herself by his name, without proof that she knew that they were not his ordinary lodgings, without other proof of clandestinity than that he did not accompany her quite to her husband's door,—Held, that adultery was not proved: *Williams* v. *Williams*, 1 Hagg. Con. 299. (The decision in this case was reversed on appeal to the Arches; but it was on further proof of identity in a totally different portion of the evidence.)

Where the wife visited a single man at his house, and the windows were closed, and there were letters which could not be otherwise explained, the Court held the adultery proved, *Ricketts* v. *Ricketts*, Con., Feb. 20, 1799, quoted 1 Hagg. 303.

Where the alleged adulterer visited the wife subsequently to the recovery of a verdict against him in an action of crim. con., the Court said: "It is out of all natural credibility that she could, if innocent, admit, as a mere friend of the family, one by whose imprudence and treachery she had been involved in so severe a calumny. It would have been the natural impulse to avoid the man with whose name she was coupled in dishonour:"—Held, sufficient for separation: *Chambers* v. *Chambers*, 1 Hagg. Con. 446.

And where a woman has been expostulated with on account of her conduct to a gentleman,

it is a strong presumption against her, if she does not in future avoid appearances that had led to such unfavourable impressions: *Loveden* v. *Loveden*, 2 Hagg. C.

The admission of a gentleman to her bedchamber at night, on a frivolous plea of illness, is strong evidence of criminality: *Cadogan* v. *Cadogan*, 2 Hagg. Con. 7 (note).

The introduction of a young man clandestinely to the house at night is evidence of adultery: *Loveden* v. *Loveden*, 2 Hagg. Con. 44.

A letter confessing violent attachment, complaining of the difficulty of meeting unobserved, marking the times of her periodical indisposition, which rendered her incapable of intercourse, is of a stronger nature than even evidence of having gone to a brothel with a person: *Loveden* v. *Loveden*, 2 Hagg. Con. 25.

Associating clandestinely with a third person, gives rise to the strongest presumption; and where there are other circumstances in addition to that clandestinity, the Court will have no doubt: *Rix* v. *Rix*, 3 Hagg. 74.

Where a lady admitted two young men to her society, who were rarely in her husband's company, and never recommended by him to her, and they visited her frequently in his absence and were each of them separate and alone with her in the absence of her husband, and breakfasted and dined with her; she visited them at

their chambers, walked and rode out with them, and was most anxious to conceal all this from her husband, the court considered these facts so closely connected with criminal habits as to give a high degree of probability to any allegation of grosser criminality: *Elwes* v. *Elwes*, 1 Hagg. Con. 272.

Faussett v. *Faussett*, 7 No. Ca. 72, is worthy of perusal, as showing how evidence affected the mind of the court under the old law.

Evidence against the husband in a suit on his wife's petition by reason of adultery.—This is a ground for judicial separation only, and the petition must be addressed as *ante*, "Practice," page 2.

Where a person continually exerts his wicked industry in order to accomplish his purpose, and does not succeed in every instance because of a firm opposition, this is more than solicitation of chastity; and if supported by other circumstances in any one instance, it will amount to adultery: *Soilleux* v. *Soilleux*, 1 Hagg. 377.

Where a considerable intimacy exists between a married man and a married woman away from her husband, the court will consider and weigh all the facts so as to ascertain, if possible, the true character of the intimacy between the parties as to whether it was merely carried on heedlessly and with want of due caution, or whether it was carried on with any real intention of

committing the crime of adultery: *Harris* v. *Harris*, 2 Hagg. 387.

Where a captain in the navy slept on a sofa in the drawing-room of the lodgings of a married woman—she sleeping up stairs, the night being wet, and he going away early in the morning; and where he also on another evening slept at other lodgings to which she had removed, also on an inclement night, it was held in that particular case, being unsupported by any other circumstance, to be no proof of adultery; as, though he, being a naval officer, was not likely to be much influenced by weather, still, from being accustomed to a sea life, his ideas as to accommodation would be likely to differ from those of a landsman; but his conduct was held imprudent: *Harris* v. *Harris*, 2 Hagg. 294.

Where a woman of loose character was received on board a ship, whereof the party charged was captain, there must have been full opportunity, if he had been so disposed to have committed adultery, the court said: "If there were any proof of indecent familiarities between the parties, or if the court was in any way satisfied that undue intimacy subsisted between them, then it would travel much more easily to the conclusion that where the facilities were so great, and the opportunity of access so easy, the crime of adultery had been committed; but there was not the least proof of any indecent familiarity nor im-

proper intimacy between the parties, nor of any conduct approaching towards it; the court had, therefore, no difficulty in concluding that the proof of the charge had failed: *Harris* v. *Harris*, 2 Hagg, 379.

Where a married man went to a brothel and remained alone in a room with a woman of notorious character for a considerable time, the Court (Dr. Lushington) said, "If these facts are not sufficient to raise a presumption of adultery, what facts would be sufficient? The authority of *Eliot* v. *Eliot* (*a*), binds the Court in the case of a woman. Now if a married man goes to a brothel, he being perfectly aware of the nature of the house, I will not say it does not supply an equal presumption of guilt as in the case of a woman; but, supposing the Court not inclined to push this presumption so far as to hold the proof conclusive, still it cannot be denied that such conduct furnishes a violent suspicion—a suspicion to be rebutted, *if rebutted it can be at all*, by the very best evidence:" *Astley* v. *Astley*, 1 Hagg. 719. It seems such as can scarcely be rebutted: Ib. 721.

The fact of a man having venereal disease long after marriage is *primâ facie* evidence of adultery: *Popkin* v. *Popkin*, Cons. H. T. 1794, 1 Hagg. 767 (note).

(*a*) 1 Hagg. Con. 302.

Where the wife alleged the communication of venereal disease by the husband to her, in support of her charge of adultery, and the husband recriminated adultery, and showed that shortly after such his wife's adulterous intercourse, and before his contracting such disease, the alleged paramour was affected with venereal disease; and there being no evidence of circumstances leading up to adultery on the husband's part, the Court held that, though when there is no aspersion upon the chastity of the wife, the venereal disease may, and frequently does furnish conclusive proof of the adultery of the husband, yet where the wife has exposed herself to the risk of infection elsewhere, the burden of proof is shifted, and she must shew either that he contracted the disease elsewhere, or that she could not have contaminated him: *King* v. *King*, 5 No. Ca. 252.

A man being frequently alone with a lady in her bed-chamber is a very strong circumstance: *Rix* v. *Rix*, 3 Hagg. 75.

Adultery—The Defence.—In cases of adultery committed by the wife, the husband is entitled to a separation unless there are such objections to his conduct as deprive him of any claim to relief. There are however, the following objections, which effectually bar his claim:—

1. Compensatio criminis, or recrimination.
2. Condonation (unless there be such subse-

quent renewal of criminal conduct as to raise a fresh ground of suit), see *post.*

3. Connivance. The active procurement or passive toleration of his own dishonour, *Crewe* v. *Crewe*, 3 Hagg. 129. See *post.*

4. Collusion. See *post.*

To plead adultery on the part of the husband in answer to a suit at his instance by reason of adultery is a good recriminatory plea, *Astley* v. *Astley*, 1 Hagg. 716.

In cases of adultery it is incumbent on the husband to make such strict legal proof of the fact charged as shall not involve himself and create a legal bar; for if by evidence which he brings to establish adultery, he at the same time involves and implicates himself, the wife has the full benefit of this evidence, nor can he avail himself of a case in which he does not appear with clear hands, *per* Lord Stowell: *Timmings* v. *Timmings*, 3 Hagg. 77. He must purge his own conduct of all reasonable imputation of the same nature: *Forster* v. *Forster*, 1 Hagg. c. 153.

In a suit for separation *á mensâ et thoro* by reason of the wife's adultery, she having, in a plea of recrimination, proved a long series of misconduct against the husband, for which she separated from him long prior to the adultery committed by her, is entitled to her dismissal; nor will a return to live in the same house, after a former separation on account of the husband's

adultery, operate as a condonation so as to extinguish her right to set up his guilt as a bar to his prayer, *Beeby* v. *Beeby*, 2 Hagg. 789.

In the Ecclesiastical Court it was a great question whether it could be pleaded that the Jewish religious regulations allow concubines, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 785: but this was because that was a Court Christian to which the parties had resorted: the Court of Divorce will probably consider themselves bound by this view by sect. 22 of the Act 20 & 21 Vict. c. 85. But even if the court should admit such defence it must be pleaded specially, 1 Hagg. 785.

A single act of adultery on the part of the plaintiff will, if fully proved, operate as a bar, *Astley* v. *Astley*, 1 Hagg. 722; though if a wife had left her husband and lived many years in a course of adultery, it may be doubted whether, if the husband in one frail moment should be faulty, it would be a *compensatio criminis*, *Naylor* v. *Naylor*, Cons. Trin. 1777, cited 1 Hagg. 721.

The mere solicition of chastity on the part of the husband has never been considered a bar, there being proof of adultery on the part of the wife, *Chettle* v. *Chettle*, 3 Phill. 508.

Where there was gross neglect on the part of the husband, and the solicitations were such as strongly to indicate that actual adultery had been committed, the wife had been exemplary in her conduct for ten years, was carried to Lisle, and

left there by the husband, and during these ten years he was using all means to seduce, almost to force, the maid-servants, three of whom denied the adultery; the fourth refused to answer, the Court doubted whether that might have been sufficient to have entitled the wife to a sentence of separation; but under all the circumstances they held the husband barred of his remedy, *Forster* v. *Forster*, 1 Hagg. c. 144. In a suit for divorce by reason of adultery, recrimination of adultery upon the complaining party is equally a bar if proved, whether such adultery have been committed before or after a voluntary separation has taken place and before or after the delinquency of the other party, *Proctor* v. *Proctor*, 2 Hagg. C. 299, and semble even if committed after the commencement of the suit; and in *Brisco* v. *Brisco*, 2 Add. 264, the Court still more distinctly inclined to the opinion that the husband's delinquency at *any* time prior to sentence will bar his claim to a separation.

Where the adultery was fully proved, but not consummation of the marriage, the general result of the evidence seeming to be that the woman would not allow consummation, but immediately eloped with the adulterer, the Court pronounced for the divorce without hearing counsel in support of it, being clearly of opinion that this is no bar, *Patrick* v. *Patrick*, 3 Phill. 496. *Compensatio criminum* need not be pleaded specially; the wife

is entitled to the full benefit of any evidence adduced by the husband which creates such a bar, *Timmings* v. *Timmings*, 3 Hagg. 77; but a party relying on condonation as a bar should plead it, *Ibid*, 84.

Where adultery is pleaded by way of recrimination, and as a bar, it is not necessary to prove such strong facts against the plaintiff as would be required to convict the other party in a suit for divorce, *Leicester* v. *Leicester*, cited 1 Hagg. Con. 153, and quoted and the principle affirmed in *Astley* v. *Astley*, 1 Hagg 721.

It is not a good plea in bar to a petition for a dissolution of marriage that the respondent had been dismissed from a suit in the Arches' Court for a divorce *a mensâ et thoro*, for that suit was not *de eadem re*, and, therefore, this is not a case in which *lis alibi pendens* is a good plea; and this Court is not bound by the standing orders of the House of Lords, according to which a dissolution could not be obtained where the husband had failed to obtain a divorce *a mensâ;* and for the same reasons the pendency of an appeal from the Arches Court is not pleadable in such a case: *Evans* v. *Evans* and *Robinson*, 27 L. J., P. & M. 57.

Entering into a voluntary deed of separation and bringing an action upon that deed does not bar the wife of her remedy by separation nor bear unfavourably on her case: *Durant* v. *Durant*, 1 Hagg. 760.

Even where the husband and wife are separated under articles of agreement, the legal relation still exists, for such an understanding is not recognized by the law: *Nash* v. *Nash*, 1 Hagg. C. 142; *Beeby* v. *Beeby*, *ib.* (note), S. C. 1 Hagg. 789; *Mortimer* v. *Mortimer*, 2 Hagg. C. 318; *Barker* v. *Barker*, 2 Add. 285; *Sullivan* v. *Sullivan*, *ib.* 299, 303; *Nash* v. *Nash*, 1 Hagg. C. 143; *Studdy* v. *Studdy*, 28 L. J., P. & M. 44.

The wife may plead adultery in bar, for they are both *in eodem delicto*; but in a recrimination of cruelty the *delictum* is not the same: *Chambers* v. *Chambers*, 1 Hagg. C. 452.

A plea amounting to an allegation that the husband was morose, severe, inattentive, and negligent is no bar to an allegation of adultery on the part of the wife: *Rogers* v. *Rogers*, 2 Hagg. 73. Indifference, ill behaviour, or cruelty is not pleadable in a suit for adultery: *Moorson* v. *Moorson*, 3 Hagg. 92; but desertion *may* be, *Coulthart* v. *Coulthart and Gouthwaite*, 28 L. J., P. & M. 21, *post* 111.

Adultery, Incestuous.—This is a ground of dissolution of marriage, 20 & 21 Vict. c. 85, s. 27.

Incest is the carnal intercourse of persons within the prohibited degrees, and as husband and wife are "one flesh," so persons related by consanguinity to the husband are related to the wife in the same degree by affinity, and *vice*

versâ, and whether the relationship be that of consanguinity or affinity, the prohibition is the same, Instit. Jur. Can. lib. 2, tit. 13.

And by 20 & 21 Vict. c. 85, s. 27, it is defined to be "Adultery committed by a husband with a person with whom, if his wife were dead, he could not lawfully contract marriage, by reason of her being within the prohibited degrees."

Parent and child, and all lineal degrees are prohibited.

Amongst collaterals brother with sister, uncle or aunt with niece or nephew are prohibited intercourse.

Adultery, with Bigamy.—This also is a ground of dissolution of marriage, 20 & 21 Vict. c. 85, s. 27.

The definition of bigamy under the present law, 9 Geo. 4. c 31, s. 22, is, "if any person being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender . . . . shall be guilty of felony . . . . Provided always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person during the space of seven years then last past, and shall not have

been known by such person to be living within that time; or shall extend to any person who at the time of such marriage, shall have been divorced from the bond of such first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

And by 20 & 21 Vict. c. 85, s. 27, it is "The marriage of any person being married, during the life of the former husband or wife whether the second marriage shall have taken place within the dominions of her Majesty or elsewhere."

It does not appear to be necessary that the offender should have been *convicted;* but the petitioner should prove the fact of both marriages, the identity of the party—(see "Identity," *post.*), and that the first marriage was a legal one: *Reg.* v. *Chadwick*, 11 Q. B. 17; *Smith* v. *Huson*, 1 Phill. 254; *R.* v. *Jacob*, 1 Moo, 140; but it is immaterial whether the second marriage were a valid marriage or not, if the fact of a marriage be proved: *Reg.* v. *Baum*, 1 Cox C. C. 34.

And the marriage of an idiot or lunatic, not in a lucid interval, is for this purpose void: 1 Russell on Crime, by Greaves, 216.

After proof of the first marriage the second wife is a competent witness to prove the fact of the second marriage, or any other fact, 1 East, P. C. 469.

The adultery must be proved, as *ante;* and it seems bigamy must be proved, and a conviction for bigamy will not suffice, *March* v. *March*, 28 L. J., P. & M. 30.

And *semble, per* Pollock, C. B. that the adultery must be proved to have been committed with the same person as the bigamy, *Horne* v. *Horne*, 27. L. J., P. & M. 30.

Adultery, with Bigamy—The Defence.—It is a good defence to an indictment for bigamy, and therefore in this suit, to show that there had been an absence for more than seven years; and it would appear that the husband is not bound to use diligence to inform himself of her whereabouts: *R.* v. *Jones*, Carr. & M. 614, per Cresswell, J. But at the Liverpool Winter Assize, 1858, Hill, J., left the whole question to the jury, *Reg.* v. *Matthews*, MSS.

It is also good to set up a previous dissolution of the first marriage; but not merely a judicial separation or divorce *a mensâ;* and these must have been pronounced in England, or if pronounced abroad, on grounds on which a dissolution would be liable to be decreed in England: *Reg.* v. *Lolley*, Russ. and Ry. 237.

Also, if the marriage has been declared void by a court of competent jurisdiction, where the question has been directly decided.—See *Duchess of Kingston's Case*, 20 How. St. Tri. 355.

And lastly, that the defendant is not a subject

of the British crown, and that the second marriage was contracted out of England.

Adultery, with Cruelty.—This is a ground of dissolution of marriage, 20 & 21 Vict. c. 85, s. 27.

The adultery must be proved as *ante*.

The cruelty being such as "without adultery would have entitled her to a divorce *a mensâ et thoro*," will be discussed under that head.—See *post*, title "Cruelty,"

Adultery, with Desertion.—Adultery, coupled with desertion without reasonable excuse for two years or upwards, is a ground of dissolution of marriage, 20 and 21 Vict. c. 85, s. 27.

See *ante*, "Adultery."

Where the husband became drunken, and on many occasions ill-treated his wife, sold off their furniture to buy drink, told his wife that she might go on the streets for a living, and then left her, whereupon she supported herself for several years; but in 1858 she discovered his whereabouts, and that he was living with a woman, and applied for him to do something for her support, which he refused; and it did not appear that the husband knew where his wife resided. The Court held that the petitioner had failed to prove the desertion, and that, on the contrary, there was every reason to think that the separation was voluntary; and desertion is the very foundation of the right to a dissolution, *Smith* v. *Smith*, 28 L. J. P. & M. 27.

"Desertion without Cause," being a ground for judicial separation when taken by itself we have considered it under that head, *post.*

But where the adultery was clearly proved, but before the marriage the wife was, to the knowledge of the husband, living an immoral life, and the married couple in consequence of her temper been obliged to leave her husband's father's house, where they had been living, and after eight or ten days from the time they left the father's, the husband, in consequence of the wife's temper, went to America, and knowingly left her without the means of subsistence which necessarily obliged her to resort to her former mode of life, and he remained abroad for four years; the Court said it would be most dangerous and destructive to the security of married life if the Court were not to exercise their discretion, and not to say there had been a wilful separation on his part; for if he meant to secure her good conduct he ought, under the circumstances, to have remained with her, and the Court refused to decree a dissolution, *Coulthart* v. *Coulthart and Gouthwaite* 28 L. J. P. & M. 21.

ALIMONY.

Alimony is that legal proportion of the husband's estate, which by the decree of the Court is allotted to the wife for her maintenance during the pendency of a suit between them; or, after

a decree of dissolution of marriage or judicial separation by reason of the husband's delinquency, the *permanent* allowance to be paid by the husband to the wife during their separation; and that even though he had no dowry with her, *Oughton*, tit. 206, *Ayliffe's Parergon*. And further it is said that a husband is bound to allow his wife alimony pending suit, whatever the cause may be, and afterwards in most cases of separation not occasioned by the wife's elopement or adultery, *Ayliffe's Parergon*. In all suits of dissolution of marriage, of judicial separation, for restitution of conjugal rights or of nullity (if promoted by the husband) it is competent for the wife, so soon as the *fact* of marriage is proved, to apply for alimony pending the suit, Poynter, 247.

The *quantum* of alimony to be assigned depends on the discretion of the Court; and when the sum is not agreed upon between the parties, a statement of the actual property as well as of the casual income of the husband is set out, to which *his* answer on oath is required, *Fraser* v. *Fraser*, Const. Lond., 1819; and this allegation should be put in at an early period to prevent the husband being harassed by his wife's debts, *Brisco* v. *Brisco*, 2 Hagg. 200, and it is usually on that evidence alone that the Court decides, *Ib.* 200.

Alimony is of two kinds, *pendente lite* or during the suit; and permanent; and is in the discretion

of the court: but this is a judicial, and not an arbitrary discretion, and is the subject of appeal: *Cooke* v. *Cooke*, 2 Phill. 41.

In payments on account of alimony the party paying may deduct the income tax: *Pemberton* v. *Pemberton*, 2 No. Ca. 17.

Alimony, pendente lite.—Alimony, *pendente lite*, is not of so large an amount as permanent alimony, for the wife should at such a time seek privacy and retirement. About a fifth of the husband's income (*a*) is usually a fair proportion; but this is subject to variations. If the husband's rank and condition require more to support them, it must be less. So if his income arises out of pay, the Court will not grant so large an allowance as if it arose from substantial property. So if he be a cavalry officer with large expenses or if he have children to maintain and educate, *Hawkes* v. *Hawkes*, 1 Hagg. 526.

The husband's statement in answer to the wife's allegation of faculties will be taken to be correct, unless the wife dispute it and examine witnesses, *Hayward* v. *Hayward*, 27 L. J., P. & M. 9.

Outlay on permanent improvements should be charged to capital, and not income, *ib.*

According to the usual practice alimony, *pendente lite*, is allotted from the return of the citation; for if diligence is used in the return, the

(*a*) "More than a sixth," *Rees* v. *Rees*, 3 Phill. 387; one-fifth, *Hayward* v. *Hayward*, 28 L. J., P. & M. 9.

wife may be considered till then as able to obtain subsistence on the credit of her husband. But if the husband take out and serve the citation, but to answer his own purposes delay the return of it, in such a case the wife may be justly entitled from the date of it. *Per* Sir John Nicholl, *Loveden* v. *Loveden*, 1 Phill. 208.

When alimony, *pendente lite*, is decreed to commence from the return of the citation, all sums paid by the husband subsequently to that return are to be allowed as part payment: *Hamerton* v. *Hamerton*, 1 Hagg. 23; *Harris* v. *Harris*, 1 Hagg. 353. Where 50*l.* had been paid by the husband on account of alimony, *pendente lite*, before the decree, the court made the sum allotted payable from the date of the decree, instead of the date from the return of the citation, *Hayward* v. *Hayward*, 28 L. J., P. & M. 9.

In the consideration of the question of alimony the husband may properly show that he had no portion with his wife; but he is not allowed to prove that her father is possessed of large property, inasmuch as he is not bound to maintain her after marriage. The estimated value of all marketable securities in the husband's possession, including a policy of insurance on his life and unproductive and mortgaged shares in an insurance company, must be included in the calculation of his income for the purpose of the allot-

ment of alimony *pendente lite*, *Harris* v. *Harris*, 3 Hagg. 351.

Where alimony *pendente lite* was allotted, the suit heard and sentence given against her, on her appealing, the Court held her entitled to alimony from the day of the appeal. The appeal suspends the sentence, but the suit still continues: and if it is no operative sentence, the husband is obliged to maintain his wife until the suit is terminated. Were it not allowed from the date of sentence there might be an interval during which the wife might have no maintenance or support; and this should not be, *Loveden* v. *Loveden*, 1 Phill, 208; *Briscoe* v. *Briscoe*, 3 Phill. 206; but it is in the discretion of the Court.

A wife *de facto* is entitled in a suit of nullity of marriage to her alimony *pendente lite*, inasmuch as a fact of marriage is necessarily pleaded, *Miles* v. *Chilton*, 1 Rob. 684.

An assignment by the husband after the commencement of a suit for divorce by the wife cannot affect her title to alimony *pendente lite*. The Court allotted such alimony at the rate of 50*l*. per annum, where the husband's income was 140*l*, and refused to stay the issue of the monition for fifteen days, *Broum* v. *Broum*, 2 Hagg. 5.

The husband is liable for the wife's necessaries supplied during the suit, but he is liable only to a reasonable amount; and, therefore, if the wife during that period incur debts to an extra-

vagant amount, that fact will not be considered in allotting alimony, *Hayward* v. *Hayward*, 28 L. J., J. P. & M. 9.

In a suit for divorce by the husband, who was insolvent, the Court refused to allot alimony, although insolvent's father was known to possess considerable property. But the Court suspended further proceedings until some maintenance should be afforded to the wife, *Bruere* v. *Bruere*, 1 Curt. 566.

In a suit for a dissolution of marriage by reason of the wife's adultery, where a divorce *a mensâ et thoro* in the Old Court had been obtained, the wife is not entitled to alimony *pendente lite*; but she is entitled to tax her costs *de die in diem*, *Holt* v. *Holt and Fleming*, 28 L. J. P. & M, 12.

If the husband has not appeared it would seem that alimony *pendente lite*, cannot be allotted.

The Court cannot under 20 & 21 Vict. c. 85, s. 46, make any order for the attendance of the husband, in order that he may be cross-examined on his affidavit in a question of alimony *pendente lite*, *Hopper* v. *Hopper*, 28 L. J., P. & M. 26.

The Court will not allot alimony *pendente lite* where the husband has not appeared, otherwise the wife, who is mistress of the suit, might unreasonably delay, *Deane* v. *Deane*, 28 L. J., P. & M. 23; *Tomkins* v. *Tomkins*, *Ib.* 24 (note.)

Permanent Alimony.—Permanent Alimony is

generally a moiety of the husband's whole income, *Taylor* v. *Taylor* Cons. of Lond. 1791, cited 2 Phill. 236; *Cooke* v. *Cooke*, 2 Phill. 40.(*a*) *Smith* v. *Smith*, 2 Phill. 235. But where the husband was a peer, one third was allotted; for the public has an interest in a peer's suitably maintaining his title, *Countess of Pomfret* v. *Earl of Pomfret*. Arches 1796, cited 2 Phill. 236. Where the delinquency was gross, but there were two sons and four daughters, whom the husband was to maintain and educate: the Court deducted the estimated expense of their education, and allotted a moiety of the remainder, *Otway* v. *Otway*, 2 Phill. 108.

Alimony is allotted for the maintenance of the wife from year to year. As a general rule, therefore unless particular reasons are set forth, the Court will not enforce a monition for payment of arrears of several years' standing. If the wife does not apply within a reasonable time, the Court will infer that she has made some more beneficial arrangement. But where there had been no application to reduce the alimony, the Court decreed alimony from one year prior to the monition—the husband being allowed all payments on account of the wife during that year, and thereafter the alimony to be continued according to the original decree. (*b*) *Wilson* v. *Wilson*, 3 Hagg 329 (*notis*): and where

(*a*) See also the cases then cited.

(*b*) See 3 Phill. 258.

no application was made to the Court, either to enforce payment or to obtain a reduction of alimony, it refused to decree for the arrears *De Blaquiere* v. *De Blaquiere*, 3 Hagg. 322.

Where profligate adultery was proved against the husband, the Court allotted permanent alimony at the rate of 600*l.* *per annum* (in addition to 120*l.* a year, the wife's separate income) out of a net property of 4000*l.* a year (the husband having twelve children to maintain and educate), from the date of the sentence—three years previously; the cause having in the mean time appealed, but remitted, no steps being then taken by the appellant, and the remaining delay being caused by his absence abroad, *Durant* v. *Durant*, 1 Hagg. 528.

Where the gross income of the husband's real estates was 6000*l.* *per annum*, the mother's jointure 1000*l.* *per annum*, and the wife's pin money had been fixed at 500*l.* *per annum*, and the husband had voluntarily undertaken to pay the wife 200*l.* a year for the maintenance of the children, the Court said, that being unable to enforce this last arrangement, it would allot 1000*l.* a year permanent alimony, allowing the husband to deduct from that sum any payments exceeding 200*l.* a year which he might make on account of pin-money, thus affording collateral security for the payment of 200*l.* a year for the children, *Mytton* v. *Mytton*, 3 Hagg. 657.

As the growing age of the children is taken into consideration when the alimony is originally fixed, the Court will not on that account diminish the comforts of the wife, though there *may* be cases where the Court would relieve the husband owing to heavy expenses arising from the children, *De Blaquiere* v. *De Blaquiere*, 3 Hagg. 330.

If the faculties are improved, the wife's allowance ought to be increased; and if the husband is *lapsus facultatibus*, the wife's allowance ought to be reduced, *De Blaquiere* v. *De Blaquiere*, 3 Hagg. 329.

Where the husband applied for the reduction of permanent alimony on account of his having lost considerable sums by unprofitable speculations, the Court said, that if he chose to speculate, he must bear the consequence, and refused to alter the amount of the allotment, and directed the arrears and costs to be paid, *Neil* v. *Neil*, 4 Hagg. 275.

It is the husband's duty to see that funds out of which the alimony of the wife is paid are properly invested, *De Blaquiere* v. *De Blaquiere*, 3 Hagg. 328.

If the income of the wife has much improved, the Court may decree a reduction; but where a house had been furnished at the expense of the husband, he being in arrear in payment of the alimony, the Court set off the one against the other. The Court also refused to interfere where

the increase was owing to the munificence of the Sovereign, *De Blaquiere* v. *De Blaquiere*, 3 Hagg. 331.

Permanent alimony is decreed from the day of sentence, *Cooke* v. *Cooke*, 2 Phill. 40.

Where the Court decreed a dissolution of marriage, on the ground of the wife's adultery, the Court ordered that the husband should pay an annuity of 150*l.* during their joint lives, *quamdia casta vixerit*, on condition of her relinquishing a power vested in her by a marriage-settlement of appointing by will 2000*l.* consols, and that 1000*l.* damages assessed by a jury against the co-respondent should be paid towards the husband's costs, *Keats* v. *Keats and Montezuma*, 28 L. J., P. & M. 57.

BESTIALITY.

See title "Rape," *post.*

COLLUSION.

Collusion is where two or more parties join together in promoting an act of adultery for the purpose of deceiving the Court, or entrapping a third party. Where it is committed by the husband and wife it has been defined to be "an agreement between the parties for one to commit, or

appear to commit a fact of adultery in order that the other may obtain a remedy at law, as for a real injury." There is then no real injury, and the law, therefore, requires that that there should be no co-operation for such a purpose, and does not grant relief where the adultery has been committed with any such view. It is a fraud difficult of proof, since the agreement may not be known to any one but the two parties in the cause, who alone may be concerned in it, for the adulterer may be ignorant of the understanding. However, it is no decisive proof of collusion that after the adultery has been committed both parties desire a separation; it would be hard that the husband should not be released, because the offending wife equally wishes it; she may have honest or dishonest reasons, innocent or profligate, and it would be unjust to make him dependent on her for his release, *Crewe* v. *Crewe*, 3 Hagg. 130.

Long duration of a criminal intercourse is a strong presumption against collusion; for if there had been a preconcerted scheme, an original design to separate, the purpose would have been more speedily effected, *Crewe* v. *Crewe*, 3 Hagg. 132; so also if the proofs are inconclusive, *Ib.*

There being no defence on the part of the wife is no proof of collusion, though it may arise from it, *Ib.* 133.

The Court will not presume collusion without something to raise such a presumption, *Pollard* v. *Wybourn*, 1 Hagg. 726. *Vide* last Act.

CONDONATION.

Condonation is a forgiveness of a conjugal offence with a full knowledge of all the circumstances, and is a question of fact for the jury. It is for the Court to direct the jury what will constitute condonation, and for the jury to determine whether, subject to that direction, the circumstances of the particular case amount to condonation, *Peacock* v. *Peacock*, 27 L. J., P & M. 71.

Condonation is a blotting out of the offence imputed so as to restore the offending party to the same position which he or she held before the offence was committed, *Keats* v. *Keats and Montezuma*, 25 L. J., P. & M. 57.

Condonation is of two kinds *remissio expressa*, by express words and succeeding reconciliation; the other *remissio tacita*, which includes a return to connubial intercourse, *Orme* v. *Orme*, 2 Add. 382; *Dunn* v. *Dunn*, 3 Phill. 9; *Snow* v. *Snow*, 2 No. Ca. Supp. xii.

There can be no condonation which is not followed by conjugal cohabition, *Keats* v. *Keats and Montezuma*, 28 L. J., P. & M. 78.

Condonation is a pardon, not necessarily abso-

lute, but which may be accompanied by conditions, *Ib.* 79.

Where the condonation rises on the face of the petition, it was unnecessary in the old Court to plead it in bar, *Snow* v. *Snow*, 2 No. Ca. Supp. xii.

If condonation is not pleaded it might in the old Court nevertheless be proved in evidence, but the Court will not help it out; it must be clearly proved, as it would otherwise operate as a surprise to the other party, *Beeby* v. *Beeby*, 1 Hagg. 795.

Condonation by the Husband of Adultery.—Condonation is where a husband or wife, cognizant of the adultery of the other, is voluntarily reconciled, *Ayliffe Parergon*, 226. It is a conditional forgiveness, which does not take away the right of complaint in case of a continuation of adultery, *Ferrers* v. *Ferrers*, 1 Hagg. C. 130.

Condonation is accompanied with an implied condition; the condition implied is that the injury shall not be repeated. A repetition at least of the same injury does away the condonation, and revives the former injury. But, if nothing but clear proof of adultery would do away condonation of adultery, the rule of revival becomes useless; for the revival is unnecessary in the face of the new fact: something short of clear proof

of the actual fact of subsequent adultery will therefore suffice to remove the bar. But the new injury need not even be *ejusdem generis*, for it is difficult to suppose that the implied condition on which forgiveness takes place could be solely of abstinence from a repetition of adultery. The plainer reason and the good sense of the implied condition is that the adulterer should in future not only abstain from adultery, but treat the innocent and condoning party in every respect (in the words of the law), "with conjugal kindness," *Durant* v. *Durant*, 1 Hagg. 762. It may be express or implied, as by the husband cohabiting with a delinquent wife; for it is to be presumed he would not have taken her to his bed unless he had forgiven her.

Condonation and connivance are very different. If the husband has discovered improper conduct between his wife and some one living in his house, he may be induced to forgive his wife, but would certainly remove the adulterer: no other conduct could be reconciled with a due care for his own honour. If he did not do so, it would amount almost to consent, *Lovering* v. *Lovering*, 3 Hagg. 86. Condonation bars sentence, but not necessarily where there is subsequent adultery, though it will induce the Court to look with particular jealousy into the case: for if the adultery is forgiven with such extreme facility

as to shew no sense of injury, and no care is taken to prevent it from happening again; then the husband has no ground of complaint, for he has encouraged the adultery by his conduct; *volenti non fit injuria, Dunn* v. *Dunn*, 2 Phill. 411.

Ultimus casus est quando conjux innocens alteri condonat adulterium, et sic reconciliantur cum enim divortium sit in favorem innocentis, potest innocens cedere jure suo, delictumque condonare, et sic cessabit jus divortii; hæc autem remissio est duplex quædam expressa, quando scilicet verbis expressis innocens conjux adulteram sibi reconciliat condonans delictum . . alia autem est remissio tacita, Sanchez, lib. 10, Disp. 5, 19, 20.

The force of condonation varies according to circumstances. The condonation by a husband of a wife's adultery, still more, repeated reconciliations after repeated adulteries, create a bar of far greater effect than does the condonation by a wife of repeated acts of cruelty committed by the husband. In the former case such reconciliations often repeated amount almost to a license to her future adultery, so as to form almost an insuperable bar, *Westmeath* v. *Westmeath*, 2 Hagg. 113 Supp.

Where the wife committed adultery on the first of three successive nights, and the husband, having full knowledge and proof of this fact, slept with her on the second, it was held that he

had thereby condoned that adultery, and that he could not avail himself of the discovery that she had again committed adultery on the third night, having remitted the other, *Timmings* v. *Timmings*, 3 Hagg. 83: so also, even where the wife made no defence. Where the husband allowed a man to remain in his house after he knew of gross and indecent familiarities, in a manner such as to amount almost to consent, to adultery; but on discovering her criminality with another man at an almost contemporary period brought his suit for a divorce by reason of this latter adultery, Lord Stowell said, "The case comes almost to this: Can a man consenting to his wife's adultery with A., but not consenting to adultery with B., take advantage of that adultery, and say to the Court, '*Non omnibus dormio.*' This is language not to be endured. The Court requires two things—that a man shall come with pure hands himself, and shall have exacted due purity on the part of his wife, and if he has relaxed with one man, he has no right to complain of another," *Lovering* v. *Lovering*, 3 Hagg. 87. But where the husband had separated from the wife by articles on account of her improper conduct with three different persons, and for four years there was no account of any adulterous connexion, but then a child was born, the fruit of a fourth adulterous connexion, and was baptized in the husband's name, the Court held the

husband not barred, even supposing the husband to have connived even at adultery, and that it was unnecessary to go into the evidence of connivance; adding that the great distinctions to be drawn between this and other cases were that the adultery was committed with another person, and after a long time had elapsed, *Hodges* v. *Hodges*, 3 Hagg. 121. It seems, however, that in this case, the learned judge was much influenced by ths consideration of the present legitimacy of the children, and of the obligation cast on the husband to maintain them; but the later decision in the *Banbury Peerage case* has lessened the force of this argument.

Where the complaining party admits on his pleadings that the wife remained a night in his house after he had discovered her criminality, Lord Stowell was of opinion that he had taken an onus upon him which does not usually lie upon the complaining party, and that he ought to show that they did not sleep together on that night, *Timmings* v. *Timmings*, 3 Hagg. 84.

Where the husband after discovering suspicious letters, took no pains, and made no inquiries until two years after, when they had left cohabiting, on the wife's preferring against him a substantive legal charge of cruelty, and then only sought for information as a defence to the wife's suit, the Court held it to be a constructive condonation, *Best* v. *Best*, 1 Add. 445.

Where a husband was proved for a long time not to have had any suspicion or intimation of criminality, though he might suspect that his wife was not sufficiently guarded, he received the news with affliction—his conduct was held inconsistent with that of a consentient husband, though, from humanity (she being pregnant), he did not discharge her until after her delivery, the evidence was held to entitle him to relief, *Walker* v. *Walker*, 3 Hagg. 59 (*notis.*)

The Court will not build a sentence of separation on confession *alone*; but, although by the rules of law, a confession does not satisfy the mind of the Judge, it must satisfy the mind of the husband, particularly where direct and unequivocal; and cohabitation after such confession is direct condonation, *Timmings* v. *Timmings*, 3 Hagg. 77.

It does not follow that because condonation will bar the remedy, it will operate on the other side. A man who has forgiven adultery cannot bring a suit; but when he complains of a wife will her forgiveness make him always a proper object to receive the sentence of the Court? *Beeby* v. *Beeby*, 3 Hagg. 797.

Condonation by the Wife of Adultery.—In order to found a condonation as against the wife there must be something of a matrimonial intercourse. If the parties have separate beds, there is no condonation; it does not rest on the wife not with-

drawing herself, *Dance* v. *Dance*, 1 Hagg. 794 (note).

A conditional promise made under force and violence, is certainly no condonation if the condition be unfulfilled, *Popkin* v. *Popkin*, 1 Hagg. 767 (notes).

There is a great natural distinction between condonation of cruelty and of adultery; and one which has not always been kept in sight, *Snow* v. *Snow*, 2 No. Ca. Supp. xii.

With respect to condonation of cruelty by cohabitation there is no doubt that when such cohabitation is the effect of force or fraud, it never could amount to legal condonation; and further connubial cohabitation is not necessarily and universally condonation, though it be in one sense voluntary: for it might be difficult, if not impossible, for the wife to withdraw from cohabitation (especially when abroad); and if such continued cohabitation were wholly unaccompanied by any intention to condone, and attended by a determination to separate on the first safe opportunity, the Court could not hold the wife barred in cases of great cruelty where the husband had not amended his behaviour. The Court must consider the safety of the wife. A continuance to share the husband's bed may not, under certain circumstances, prove that she was not afraid of renewed violence, or that he repented of

the past: and, therefore, where, after acts of great cruelty, the wife, in France, after taking legal advice, continued cohabitation for three days, under a promise from the husband not to renew his violence during their stay there, and was then brought home by her brother, and immediately commenced proceedings, there being nothing to show an intention on the part of the husband permanently to treat her with kindness it was held that there had been no condonation, *Snow* v. *Snow*, 2 No. Ca. Supp. xv.—xix.

After a condonation of cruelty and adultery, new acts of cruelty will revive the whole, as well the acts of adultery that were committed before the reconciliation (though there were no new acts of that kind), as also the acts of cruelty; and the wife is as much at liberty to charge her husband with those former acts of adultery, notwithstanding the reconciliation, as she would have been if there had been no reconciliation at all, *Worsley* v. *Worsley*, 1 Hagg. 734; S. C. 2 Lee, 572. Confirmed in *Durant* v. *Durant*, 1 Hagg. 765; *Eldred* v. *Eldred*, 2 Curt. 385. Circumstances may take off the effect of condonation which would not support an original cause. Facts of cruelty revive adultery, though they would not support an original suit. Words of heat and passion, of incivility or reproach, have been held not

to be alone sufficient for an original cause, nor harshness of behaviour; but Lord Stowell thought that their operation would be stronger in removing condonation, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 782; *Durant* v. *Durant*, 1 Hagg. 765. Lord Stowell also said, "It is not proved that acts of adultery will not revive cruelty, nor that acts of cruelty will not revive adultery . . I do not know that the two are so slightly connected that one will not revive the other. No such case has been cited, nor do I know that such has been the doctrine of the Court, I have rather understood otherwise, and *Worsley* v. *Worsley* is in point," *Popkin* v. *Popkin*, 1 Hagg. 767: and this is distinctly laid down in *Snow* v. *Snow*, 2 No. Ca. Supp. xiii. But the Court has felt a difficulty in determining how far and *what* cruelty will amount to a removal of condonation, *Durant* v. *Durant*, 1 Hagg. 772. Where the husband falsely and maliciously accused his wife of adultery, it was doubted if this would wipe away the previous condonation, *Ib.* 770.

An attempt at adulterous intercourse will wipe away a previous condonation, per Dr. Lushington, *Snow* v. *Snow*, 2 No. Ca. Supp. xiv.

The mode in which a return to cohabitation after a separation is effected, whether by a mere passive acquiescence or a more active consent is material to show whether there was condonation or not, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 781.

The wife's unwilling acquiescence in returning to live in the same house, but without connubial intercourse is no condonation, *Ib.* 782. Though that case is not decisive, as there there was evidence of cruelty subsequent to such qualified cohabitation; and in *Popkin* v. *Popkin*, 1 Hagg. 708 (*notis*), even a return to connubial intercourse under very peculiar circumstances, was held not to amount to condonation.

Condonation will not so soon bar a wife as a husband, *Walker* v. *Walker*, 2 Phill. 156; but where the misconduct charged had lasted for thirty years, during which time the husband had lived in open adultery; and at last it was not the wife who left the husband, but he who left her, it was considered that she had condoned it; but the Court doubted whether the condonation would not be taken off, *Ib.*

Condonation with respect to women is not held to operate so strictly: a woman has not the same control over her husband, has not the same guard over his honour, has not the same means to enforce the observance of the matrimonial vow; his guilt is not of the same consequence to her; therefore the rule of condonation is held more laxly against the wife. But it does not follow that, because she overlooked one offence, which she could not prevent, that is to be construed to give an universal license, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 787. She may be *sub potestate*, or *inops*

concilii. It is not improper she should, for a time, show a patient forbearance; she may find a difficulty either in quitting his house, or withdrawing from his bed. The husband cannot, on the other hand, be compelled to the bed of his wife—a woman may submit to necessity. It is too hard to term submission mere hypocrisy; it may be a weakness pardonable under many circumstances, *Beeby* v. *Beeby*, 1 Hagg. 793; see also *Dance* v. *Dance*, 1 Hagg. 794 (*notis*), *Popkin* v. *Popkin*, 1 Hagg. 708 (*notis*). Condonation will not so soon bar the wife as the husband, *Walker* v. *Walker*, 2 Phill. 156.

In a suit for separation, by reason of the wife's adultery, she pleaded that she had separated from her husband long before the fact of adultery, by reason of his adultery, solicitation of his servants' chastity, and communication of venereal disease to her; she was held entitled to her dismissal; nor was it held a condonation on her part that she had in the interim returned to cohabitation, from her mother refusing to receive her, *Beeby* v. *Beeby*, 1 Hagg. 789.

Condonation of Cruelty.—If the evidence establish a plain case of condonation, the Court will probably take notice of it, though not pleaded; for acts condoned, and not revived by subsequent misconduct, could not be considered as a legitimate foundation for a decree of judi-

cial separation, *Curtis* v. *Curtis*, 27 L. J., P. & M. 79.

The Court would long hesitate before finding as a fact or laying down as a matter of law that accompanying the respondent to a foreign land from apprehension of the privation of children, and their removal to a foreign land under the unrestricted control of a harsh and excitable father, operates as a condonation of cruelty on the part of the wife, *Curtis* v. *Curtis*, 27 L J., P. & M. 79.

Where the petitioner had not recently suffered any personal violence, but was treated with great harshness, insulted in the presence of her servant, displaced from her proper position in her house, and rendered subordinate to her own servant; not, indeed, on account of any immoral propensities of the respondent, but from a violent and unreasoning exercise of authority, it was held that there was no condonation of earlier acts of cruelty, and that such conduct was a breach of the implied condition which the law annexes to condonation, and was sufficient to excite a reasonable apprehension of further violence, *Curtis* v. *Curtis*, 27 L. J., P. & M. 83.

A natural test of injuries of this kind is the sense in which they are received; if they are not resented as injuries at the time, a state of things intervenes which either detracts from the weight

of particular evidence when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties, *Westmeath* v. *Westmeath*, 2 Hagg. Supp. 52. Recognized in *Curtis* v. *Curtis*, 27 L. J., P & M. 77.

A plea of condonation is a good plea in a suit for separation by reason of cruelty; but subsequent acts of a slighter nature than would constitute original cruelty, will revive the whole, and for this plain reason that apprehension would be more easily and justly excited, *Westmeath* v. *Westmeath*, 2 Hagg. 112, Supp.

After an examination of the authorities in the Ecclesiastical Courts, the Court declared that, where there have been acts of violence followed by condonation, threats subsequently uttered, if of such a nature and so expressed as to satisfy the Court that further cohabitation would be attended with danger to the party threatened, constitute sufficient ground for a decree of judicial separation, *Bostock* v. *Bostock*, 27 L. J., P. & M. 186.

It is not sufficient to revive condoned cruelty (unless such cruelty were of a very aggravated description) that the husband detained the wife in the house, locked the door, and closed the windows, when fresh air and exercise were prescribed for her, *Evans* v. *Evans*, 2 No. Cas. 476.

CONFESSION.

Confession *alone* could not in the old court be received (*a*); for otherwise there would be no check on collusion. A confession need not apply to time and place; but, if general, will apply to all times and places at which it might appear probable in proof that the fact might have taken place, *Burgess* v. *Burgess*, 2 Hagg. c. 227; but *quære* whether where the confession is pleaded in bar to a suit for restitution of conjugal rights, this rule applies. Per Lord Stowell, *Ib.*: A confession was alleged wrung from the party making it by the strong emotions of her own mind *in articulo mortis*, at a moment when her declaration, made even against others, much more against herself, would be received upon the footing of sworn testimony; it was made to the parties injured for the exoneration of a loaded conscience; it was confirmed, at her own desire, by the most solemn act of her religion; it was repeated some time afterward, to another person interested in knowing it, and with a reference to circumstances within the knowledge of that person, which had occurred on the very day to which the confession carried back the criminal act. To this objection

(*a*) We have inserted this heading notwithstanding the recent changes as to what is evidence in these cases, as the Courts will doubtless hesitate as long in cases of this kind as in criminal cases to proceed on mere confession.

was made, that confession alone will not support a charge of adultery; on which Lord Stowell remarks in his judgment: "It is certainly true that such is the letter of the canon which guides the proceedings of this Court, and such is the interpretation which it has received. The more rational doctrine, perhaps, is, that confession, proved to the satisfaction of the Court to be perfectly free from all suspicion of collusive purpose, might be sufficient to found a prayer for a mere separation *a mensâ et thoro*, though not *pro dirimendo matrimonii vincula*, so as to enable the party to fly to other connexions. The distinction is more rational here; for certainly it would be a pretty harsh injunction of law to compel a man whether he would or no, to live with a wife who had admitted her infidelity to his bed. And so the ancient Canon Law seems to have considered it, by recognizing a difference, between the two cases of absolute divorce and of mere separation. (*a*) Such likewise was the distinction taken in the more ancient canon of this country (*b*). But the canon now established (*c*), and as enforced by interpretations too literal and too numerous to be shaken, at this time of day, by any consideration of hardship (however justly urged), certainly has overlooked the distinction and applied the rule indiscriminately; though

(*a*) X. 4, 19, 5.
(*b*) A.D. 1597.
(*c*) A.D. 1603. Can. 105.

Oughton (an authority of no mean consideration in this Court) very reluctantly, if at all, submits to the construction (*a*), and appears to hold out that if the Court, after all circumspection used, is satisfied of the sincerity of the confession it ought to rest upon it as proof," *Mortimer* v. *Mortimer*, 2 Hagg. C, 316. In this case, the Court was merely called upon as to the admissibility of the allegation to proof. It contained, in addition to the allegation of confession, one of proximate circumstances. The Court admitted the whole to proof, expressing the strongest opinion that if proved to the extent in which it was laid, the husband would be entitled to a sentence of legal separation, adding, "What its effect may be as a mere bar to the present suit, if the proof falls short of the full extent, I can better ascertain when I see how it does fall short," *ib.* 320. It was, however, settled between the parties without further hearing.

The declaration of a *particeps criminis* is weak evidence in an ordinary case; but where the criminal intention is fully established, and nothing but the consent of the other party is wanting, it may be taken in addition to the conduct of such a person, which is evidence of the most stringent kind that the act which he was always attempting to accomplish has been consummated, *Soilleux* v. *Soilleux*, 1 Hagg. C. 376.

(*a*) Tit. 214.

Where the husband charged the adulterer with the fact, and he admitted it, but was not afterwards examined as a witness, *held* no evidence as against the wife; but on the husband informing her of this admission, she confessed its truth; and this was allowed to be evidence against her, *Burgess* v. *Burgess*, 2 Hagg. C. 235 (note).

Where there was an admission by the *particeps criminis*, followed by confession by the wife, and supported by facts, the divorce was decreed, *Burgess* v. *Burgess*, 2 Hagg. C. 223. Confirmed on appeal.

Quære, whether the rule as to confession applies to unsuspected letters to third persons, *Owen* v. *Owen*, 4 Hagg. 261. Entries in a private diary, kept by the wife, detailing acts of adultery committed with L., the co-respondent, were held evidence against her as an admission or confession, *Robinson* v. *Robinson and another*, 27 L. J., P. & M. 91.

Where the confession seemed to be such as to preclude all danger of collusion and imposition, as where a suit had been commenced by the party confessing, for the restitution of conjugal rights, the Court, though not saying that such confession did not fall within the general rule, seemed *inclined* to admit them as not falling within its scope, *Burgess* v. *Burgess*, 2 Hagg. C. 226; *Mortimer* v. *Mortimer*, 2 Hagg. C. 316.

Facts proximate to acts of adultery may sup-

ply all the legal defect of a solitary confession, *Mortimer* v. *Mortimer*, 2 Hagg. C. 317.

Where the wife is charged with adultery, her conduct and declarations, on a confession of guilt by the alleged *particeps criminis* being communicated to her, are admissible evidence on behalf of the husband, *Harris* v. *Harris*, 2 Hagg. 407. It has been truly said that the Court will not build a sentence of separation on confession alone; but this is sufficient to satisfy the mind of the husband, so as to justify him in a separation, *Timmings* v. *Timmings*, 3 Hagg. 77. But in *Owen* v. *Owen*, 4 Hagg. 261, Dr. Lushington went further, and said, "The principle on which the rule is founded, is fear of collusion between the husband and wife; in this case there is no such idea. There were, however, other circumstances in that case on which the decree was founded."

Where the alleged adulterer was a pupil of the husband, living in the house, it was held that no presumption of adultery could be found from the fact that a considerable intimacy between the wife and the alleged adulterer existed, but that if an intercourse fuller of suspicion, more frequent, and more intimate than might have been expected from their positions was shown to exist, that fact would be a sufficient confirmation of a confession within the 105th canon, *Noverre* v. *Noverre*, 1 Robt. 429, S. C. 4, No. Ca. 652.

When the confession was full, and the wife was ready to receive, and did receive a letter from the alleged adulterer, which contained an admission of improper intimacy, and remained a day with him on his arrival in England from abroad, this was held sufficient, *Tucker* v. *Tucker*, 5 No. Ca. 461. As also where there was a confession, with proof of the wife having lived away from her husband, for a fortnight without cause, and although there was no proof of undue familiarity with the alleged adulterer, nor any but indirect evidence as to where she had been, *Deane* v. *Deane*, 5 No. Ca. 632.

CONNIVANCE.

Connivance may consist either in the husband's taking active steps to procure his wife's dishonour for the purpose of obtaining a divorce; or it may consist merely of toleration and acquiescence, or a passive sufferance of adultery on her part.

On the principle that *volenti non fit injuria*, connivance on the part of the husband will bar him of his remady for the adultery which had taken place, *Rogers* v. *Rogers*, 3 Hagg. 58. (See also the authorities there cited).

It is not necessary that any active steps should be taken by the husband to corrupt the wife, to induce her to commit the criminal act. Passive

acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime: but, on the other hand, it has always been held that there must be *a consent*. The injury must be *volenti*—it must be something more than mere negligence, than overconfidence, than dulness of apprehension, than mere indifference: it must be intentional concurrence in order to amount to a bar, *Rogers* v. *Rogers*, 3 Hagg. 59. The defence is not a denial of the fact; but what is said to be equivalent in law. It is said the husband connived; but they do not impute active means, but a passive consent: passive consent is sufficient; but there must be a consent, an acquiescence of his will; not mere negligence; not too high a confidence or a misplaced confidence. There must be evidence that he was passively concurrent; that he saw the train laid for the corruption of his wife; that he saw it with pleasure, and gave a degree of passive concurrence to it, *Walker* v. *Walker*, quoted 3 Hagg. 59.

The general and simple rule is, if a man sees what a reasonable man could not see without alarm, if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; but this is not to be too rigorously applied without making allowances for defective capacity, dulness of perception, or the like, which

excluding intention, is not connivance; the presumption of law is against connivance: and if the facts can be accounted for without supposition of intention, the Court will incline to that construction. To bar the husband there must be intention on his part: I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy; he would be *particeps criminis*, *Moorsom* v. *Moorsom*, 3 Hagg. 107.

To constitute connivance the facts must be such as would have a direct tendency to cause adultery to be committed or continued, and such adultery must be clearly proved, *Stone* v. *Stone*, 1 Robt. 99.

The evidence to establish connivance can hardly in any case be other than circumstantial: it can seldom happen that the connivance can be proved by one or two broad facts, that two cases of circumstance can exactly coincide in all their features, *Rogers* v. *Rogers*, 3 Hagg. 60.

If the facts are equivocal, the presumption is in favour of the absence of intention to connive at criminality, *Ib.* 60; *Rix* v. *Rix*, 3 Hagg. 76.

Delay is a proof of connivance. The husband must wait for adequate proof; but he is not to delay longer than is necessary to obtain such proof: whatever his motives for afterwards coming to the court, if it be proved that there has been a long course of criminal conduct of which he was cognizant, or of which by law and pre-

sumption he must be presumed to have been cognizant, he cannot receive relief, *Crewe* v. *Crewe*, 3 Hagg. 132.

If the husband, once in possession of a fact of adultery, continues his cohabitation, it proves connivance, collusion and facility, *Ib.* 83.

Where the husband knew of the paramour sleeping in the house, it was held to be rather a proof that he was *not*, than that he was acquainted with the latter's intentions; and the fact of there being clandestinity in the intercouse with the wife, was an additional proof, *Rix* v. *Rix*, *ub. sup.*

Where the husband without any *strong reasons* to believe in the repentance of his wife, or any other great inducement, lightly condones her misconduct, it will lead the Court to watch for connivance, for he appears not to estimate the injury as he ought, *Timmings* v. *Timmings*, 3 Hagg. 78.

It is not necessary to prove connivance to actual adultery any more than it is necessary, on the other side, to prove an actual and specific fact of adultery. If a system of connivance at the improper familiarity, almost amounting to proximate acts, be established, the Court will infer a corrupt intent as to the result, and will not call for more direct proof, *Moorsom* v. *Moorsom*, 3 Hagg. 95; *Boyes* v. *Baillie*, 3 Bligh, 491.

If there has been such extreme negligence to the conduct of his wife, such an encouragement

of acquaintance and familiar intercourse as was likely to lead to the consequence which ensued—an adulterous intercourse—it would subject him deservedly to a refusal of separation, *Gilpin* v. *Gilpin*, 3 Hagg. 153; but great inattention will not bar him of his remedy, *Rix* v. *Rix*, 3 Hagg. 74.

Where the Court said that the husband could not be acquitted of most culpable negligence—of the most supine inertness—when his honour loudly called for his most active interposition, but found that there was no *corrupt* connivance on his part, the separation was decreed, as there must be knowledge, or presumed knowledge of adultery or improper familiarities leading thereto, *Phillips* v. *Phillips*, 1 Rob. 144.

It is not mere imprudence and error of judgment, which the law deems connivance. Where a man take a step for the best, and it turns out otherwise, it is not such an error which is to be laid to his charge. Different men have different degrees of judgment and judge differently: nor are we to judge by the event. A Court must look *quo animo* the step is taken; and if it be meant well, although it have a fatal consequence, it were hard indeed to fasten on mere imprudence the consequence of guilt. Conduct to bar must be directed by corrupt intention, *Hoar* v. *Hoar*, 3 Hagg. 140.

The husband is frequently the last person who

entertains a suspicion of his misfortunes; and the Court seems disinclined to presume connivance on that ground, *Loveden* v. *Loveden*, 2 Hagg. C. 11; but where a criminal correspondence is carried on in an open and shameless manner, with slight caution and little reserve, when the fact is absolutely done *in triviis*, it cannot be supposed to have been altogether unknown to him, *Timmings* v. *Timmings*, 3 Hagg. 79. See also *Lovering* v. *Lovering*, 3 Hagg. 85.

Remonstrances are usually confined to hours of privacy; and the circumstance of the wife not desisting is no proof that none were made, *Burgess* v. *Burgess*, 2 Hagg. C. 226.

Unless the husband may be fairly presumed to think that something really culpable is passing, his not withdrawing his wife from the society of one afterwards ascertained to be the adulterer, will furnish no very serious inference against him, *Ib.*

Where no adultery during cohabitation is charged or admitted, there must be the clearest possible evidence, in order to establish connivance, *Rogers* v. *Rogers*, 3 Hagg. 72.

Where a separation subsists at the time of the adultery charged, it is peculiarly incumbent on the party charging it (especially that party being the husband) to make out most satisfactorily to the Court, that the injury complained is one to which he or she is not in any way accessory, *Barker* v. *Barker*, 2 Add. 288.

But it is no connivance to give full scope to the wife's licentiousness, in order to obtain conclusive evidence of her guilt: "Viro suspicanti adulterium uxoris licitum est illam observare cum testis idoneis, ut eam posset de adulterio convincere. Quoniam id non est ejus peccato connivere sed uti ejus malitiâ ad proprium commodum. Seculedo quia aliud est rogare, consulere, vel jubere, malum, quod nunquam licet ob aliquod magis bonum," Sanchez, X. Disp. 12, 52, which was recognized as English law in *Timmings* v. *Timmings*, 3 Hagg. 82.

A husband has suspicions, he has some intimation, but he has not sufficient to instruct a legal case. In that distressing interval his conduct is nice; and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and if he continues cohabitation he then becomes liable to imputations, *Elwes* v. *Elwes*, 1 Hagg. C. 293.

But if the party proceeding shall have had "notitiam saltem probabilem criminis commissi, and shall continue cohabitation, that is condonation; and this notitia probabilis is, if witnesses can signify to the party that they can depose to adultery, "ex propriis eorum visu et scientia" Oughton Ord. Judic. tit. 214.

So where the husband had received a letter informing him of his wife's adultery, and had heard of it from witnesses, one of whom spoke of

a peculiar mark in her face, and thereupon declared that it must be his wife, and still continued to cohabit with her, it was held strong proof of condonation, *Dillon* v. *Dillon*, 3 Curt. 112.

A plea of connivance does not necessarily admit adultery, *Rogers* v. *Rogers*, 3 Hagg. 58. Undoubtedly, if the wife admit in one part of the defence a fact, or even a proximate act of adultery, it is not open to her to say in another part that she is not guilty; but it is competent to her to say, "There may have been suspicious appearances, though I deny criminality; and those appearances into which I have been betrayed have occurred by the contrivance of my husband, or have been produced by an insidious project on his part; but I have not completed his intention:" as, in a case of recrimination, the party may deny her own guilt, but at the same time say that even, if she had been guilty, yet the conduct of the husband was such as to bar him in his suit, *Moorsom* v. *Moorsom*, 3 Hagg. 91. A plea of connivance must necessarily for the most part be circumstantial, and consist of many facts, trifling perhaps, when taken separately, but altogether, making a case calculated to affect the judgment of the Court. It can hardly be supposed that a man will avow such a purpose, or betray it by any single, broad, unequivocal act. The Court, then, must admit considerable latitute in such a defence, 3 Hagg. 93 unless there are declarations to establish it, *Moorsom* v. *Moorsom*.

Connivance must, in general, depend on circumstances, and is to be gathered from a train of conduct which the Court is to interpret as well as it can, *Ib.* 106.

It is no proof of connivance that the husband allowed the wife to receive presents of fruit or game; these stand on a different ground from a supply of money, and pass as acts of common civility, *Moorsom* v. *Moorsom*, 3 Hagg. 94.

Where the husband still retained in his service and favour a servant who had been an active instrument of the wife in all her profligate transactions, after full knowledge of this fact, it was held to be a strong circumstance to his disadvantage, *Timmings* v. *Timmings*, 3 Hagg. 83.

Where the husband is so very imprudent as to recommend to the society of his wife a man excluded by others, it goes further than carelessness, and lays a foundation for the belief of the design imputed. If the husband had such a design he would not introduce a virtuous man as his accomplice, but just such an one. It has been said his character is the antidote; in the same way it might be said that if he had carried her to a brothel, and told her the character of the house, it was a sufficient caution. It is the husband's duty to give his wife the benefit of his prudence and protection: his practice was to leave her alone with this man; and this is not to be explained upon the ground of a

virtuous and proper confidence, nor is his permitting him to conduct her to, or dance with her at assemblies, without expressing displeasure. This may amount to connivance, *Moorsom* v. *Moorsom*, 3 Hagg. 94. But, unless his conduct was so flagitious that he was not received in general society, the Court would not impute an evil design, unless other circumstances warrant it in so doing, *Ib.* 111.

Where the adultery was clearly proved, the wife having had children by the adulterer, but the husband had been away from his wife for months, first from illness and then from business, and did not send for her or write to her, and did not provide for her or his children, the Court held this to be total desertion; for, if a husband is totally indifferent to his wife, if she goes with another man—lives in his house as mistress of his children openly—and has children by him, the husband has consented to her adultery, and is barred of his remedy, *Michelson* v. *Michelson*, 3 Hagg. 149.

If it can be shown that improper familiarities from a very debauched man passed in the sight of the husband without his interference, it would give reason to believe that he was not averse to greater familiarity, *Moorsom* v. *Moorsom*, 3 Hagg. 95.

A constant intercourse for four years between a wife and her paramour, not clandestine, but

the common subject of conversation, raises a grave suspicion of connivance: but as there was no other evidence, and as the adultery was clearly proved; and, moreover, the husband and wife had been married twenty years, and had had five children, and on that account his confidence might have been more unlimited, the Court held him not barred, *Crewe* v. *Crewe* 3 Hagg. 137.

If the husband be much older than the wife, it may lead to an obligation in him to exercise a more vigilant control over her conduct, *Gilpin* v. *Gilpin*, 3 Hagg. 153.

A party marrying a woman whom he has previously seduced, is bound to exercise more than ordinary care over her conduct, *Dillon* v. *Dillon*, 3 Curt. 96; *Graves* v. *Graves*, 3 Curt. 235.

Where the family of the wife took alarm at an intimacy which she had formed, and remonstrated with the husband, but he refused to attend to them, saying he would not offend his best customer by laying restrictions on his wife's conduct, it was held to go a great way to impress a suspicion of his criminal design, and to show connivance, *Moorsom* v. *Moorsom*, 3 Hagg. 94.

Where the husband sent letters inviting a young man to his house when he himself intended to be out, and encouraged him to walk with his wife, had lodgings where he slept alone, invited the young man and his wife to walk there with him, and then left them to return to Bath together; and on

three occasions during Chippenham races studiously took care to leave them alone, these were held very material facts to prove connivance, *Gilpin* v. *Gilpin*, 3 Hagg. 155.

Where the wife had deserted her husband *five* years before, and there was no evidence whether he felt any distress at her elopement, and a child was born within eight or nine months after her cohabitation with the adulterer, and the child was openly registered, the Court required some explanation, but allowed the husband to make it by affidavit, *Best* v. *Best*, 2 Phill. 161.

Brutal behaviour, obscene and disgusting language, and entire disregard of decorum, will not *alone* constitute connivance, *Stone* v. *Stone*, 1 Robt. 101.

The extent to which neglect, however culpable, is sufficient to bar the husband of his remedy, has never been decided; but it is possible to conceive that a case might arise of such wilful neglect, or rather exposure, as might, without proving actual connivance, possibly bar the husband of all remedy by a divorce. A husband might introduce his wife to society so abandoned, and expose her to risks so great as to render a deviation from the paths of chastity the most probable, if not the necessary consequence. The Court would then, perhaps, not wait for proof of actual connivance on the part of the husband, but would hold him to the consequences arising from the

temptations to which he had introduced his wife, *Harris* v. *Harris*, 2 Hagg. 415.

It would go to sap the foundations of all morality if the husband might introduce to his wife persons of bad character, and then, when she followed the example held up to her, be permitted to come to the Court and ask for a separation. Still more is such an allegation admissible when the husband is charged with adultery with the improper persons so introduced. It is then pleadable first with reference to the wife's own defence, and next with reference to this being the very person with whom adultery is countercharged, *Graves* v. *Graves*, 3 Curt. 240.

Where the husband copied a part of a letter which contained observations tending to put him on his guard against H., and did not break off all intimacy with H.; but there was no proof of adultery with H., this was held no proof of connivance at all, still less in a charge of subsequent adultery with L., *Stone* v. *Stone*, 1 Robt. 99.

Where a deed of separation is so ample in its stipulations for the wife's perfect free agency for the future as to found a presumption that it might (so intended) license the very conduct in the wife of which the husband complains, the husband is bound to rebut such presumption by evidence, *Barker* v. *Barker*, 2 Add. 285. But where the wife, by the clandestinity of her adulterous

intercourse, shewed that she did not so interpret the deed of separation, and the husband immediately on the discovery took steps to bring the matter before the Court, it was held that there was no suspicion that he had licensed his wife to form any such connexion, *Sullivan* v. *Sullivan*, 2 Add. 304. A deed in the usual terms gives the wife license to live with whom she pleases as a *feme sole*—not in a state of adultery. Deeds of this description have always been so construed, *Richardson* v. *Richardson*, 1 Hagg. 9.

Where the husband actually *contrives* a meeting between his wife and the suspected adulterer, invites him to his house, and then leaves them together, this is more than connivance; it is legal prostitution, *Timmings* v. *Timmings*, 3 Hagg. 82.

Affectionate conduct to a wife during many years, with no appearance during that time of any wish to withdraw from her society, and the absence of any reason to suppose that the husband knew or suspected her depravity till very shortly before she left him, tend most strongly to disprove connivance at her turpitude, still more that he has actively contributed to her prostitution, *Hoar* v. *Hoar*, 3 Hagg. 139.

Where an adulterous connection had existed with the wife's knowledge from 1835 to 1837, and after 1837, there was no renewal of intercourse between the husband and wife—the adul-

tery was continued until the death of the adulteress in 1845, the husband having, in 1837, declared his resolution never to return to cohabitation with his wife: Held, that the wife had done nothing to connive at or condone the adultery, *Angle* v. *Angle*, 1 Robt. 634.

Where the husband and wife separated by mutual consent, he allowing her twelve shillings a week, and two years afterwards, on discovering that she had committed adultery, sent one of his witnesses to her, who deposed as follows: "He requested me to ask her if she would take eight shillings per week . . . I advised her to accept such offer. It was on the implied understanding on the part of her husband that he would not interfere with or object to the course of life she might lead, or any connection she might form, that such reduced allowance was offered to her. It was upon that express understanding on the part of the husband that the twelve shillings a week had been offered and accepted by the wife in the first instance:" Held, a corrupt facility, if not an intentional permission on the part of the husband, whereby he had barred himself of his remedy, *Drew* v. *Drew*, 1 No. Ca. 315.

Connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he has allowed to take place, *Rogers* v. *Rogers*, 3 Hagg. 58; but

quære, if connivance at actual adultery, proximate acts, or even at such gross familiarity as necessarily infers consent and intention to prostitute his wife *during* cohabitation, was clearly established, whether the husband could obtain relief because the wife continued or even commenced an adulterous intercourse with the same persons after separation, *Rogers* v. *Rogers*, 3 Hagg. 72.

Where in an action of *crim. con.* the defence was connivance, evidence was received on behalf of the plaintiff of the wife's contemporaneous declaration as to her intention, *Hoare* v. *Allen*, 3 Esp. 276.

CO-RESPONDENT.

A co-respondent, until dismissed from the suit, (as he now may be, 21 & 22 Vict. c. 108, s. 11), cannot give evidence, he being a party to the suit, and within the stat. 14 & 15 Vict. c. 99, s. 4, and 16 & 17 Vict. c. 83, *Robinson* v. *Robinson and Lane*, 27 L. J., P. & M. 91.

By the Act 20 & 21 Vict. c. 85, s. 28, in suits at the instance of the husband by reason of adultery, the other party to the act of adultery alleged, shall, except by leave of the Court, and in suits at the instance of the wife, may, be made parties to the suit, and may (sec. 33) be ordered

to pay the costs of the suit, and also (sec. 33), damages to the party aggrieved.

A co-respondent will not be ordered to pay the petitioner's costs, unless there be evidence of how the adulterous connexion began, and that at the time of the adultery, he knew that the respondent was married, and that her husband was alive, *Boddington* v. *Boddington and Nossiter*, 27 L. J., P. & M. 53; *Teagle* v. *Teagle and Nottingham*, 27 L. J., P. & M. 55.

But where the co-respondent knew the respondent to be married at the time of the adultery, the Court ordered him to pay the costs of the petitioner, *Badcock* v. *Badcock and another*, 27 L. J., P. & M. 55.

And where, in a defended action of *crim. con.*, the petitioner had recovered *substantial* damages, which, with the costs had been paid, and had also obtained a divorce *a mensâ et thoro*, the Court refused to condemn the co-respondent in costs, the Divorce Act being as regarded him *ex post facto* legislation, *Ling* v. *Ling and Croker*, 27 L. J., P & M. 58.

Under 20 & 21 Vict. c. 85, s. 31, adultery, cruelty, desertion, or wilful separation, or such wilful neglect or misconduct as has conduced to the adultery, *may* induce the Court to dismiss the suit.

Oliver v. *Oliver*, 1 Hagg. C. 364; *Lockwood* v. *Lockwood*, 2 Curt. 283; *Kirkman* v. *Kirkman*, 1 Hagg. 409 . . . If the safety be endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone; it cannot be necessary that, in order to obtain the protection of the Court, it should be made to appear to proceed from malignity, *Kirkman* v. *Kirkman*, 1 Hagg. C. 410; *Holden* v. *Holden*, 1 Hagg. C. 458; *Curtis* v. *Curtis*, 27 L. J., P. & M. 73.

Cruelty may be relative and depend on the age, habits, &c., of the party, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 782.

Within the range of cruelty, it is obvious that the means and rank of the parties must make some difference. The denial of necessaries and comforts, even of medical assistance, when there are no pecuniary resources, never can be construed into acts of cruelty; but no one could entertain a reasonable doubt that such a denial, when the fortune was ample, might probably, under circumstances, be considered differently: and necessaries and comforts mean very different things in different ranks of life; but the Court will not inquire further than is necessary, in order to ascertain that the ordinary comforts of the wife are preserved, *Dysart* v. *Dysart*, 1 Rob. iii.

One act of cruelty entitles the wife to relief, *Popkin* v. *Popkin*, 1 Hagg. 768.

A single violent act occasioning pain and injury to the wife, but unaccompanied by any threat or intentional blow, is not sufficient whereon to found a sentence of separation, unless, under the whole circumstances of the case, the Court feels satisfied that cohabitation may not be resumed without danger to life and limb, *Neeld* v. *Neeld*, 4 Hagg. 270; *Collett* v. *Collett*, 1 Curt. 684.

The law does not require many acts. The Court has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation; because if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed that it will not be repeated. But it is only on this supposition that the Court forbears to interpose its protection, even in the case of a single act; because if one act should be of that description which will induce the Court to believe that it is likely to occur again, and to occur with real suffering, there is no rule to restrain its interference, *Holden* v. *Holden*, 1 Hagg. C. 458.

Whatever may have been the cause of conduct towards the wife likely to endanger her safety, whether arising from natural violence of disposition or from want of moral control, or from eccentricity, it is for the Court to consider the

conduct *itself* and its probable consequences; the motives and causes cannot hold the hand of the Court, unless the wife be to blame. If conduct dangerous in itself arise from morbid feelings out of the control of the husband, the Court must act if the danger exist, *Dysart* v. *Dysart*, 1 Rob. 116.

Where an act of violence is committed under the influence of an acute disorder, and it is made clear that the disorder having been subdued, there is no danger of a recurrence, the Court will not interfere; but, if the result has been a new condition of the brain rendering the party liable to fits of ungovernable passion, then the Court is bound to emancipate the wife, *Curtis* v. *Curtis* 27 L. J., P. & M. 86.

Acts are not necessary. Words of abuse and reproach produce only resentment; but words of menace, intimating an intention of doing bodily harm, and even affecting the security of life, are legal cruelty. The Court must interpose when words have the effect of producing terror, and the apprehension of bodily injury reasonably consequent from their meaning and use, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 775 (note); *Harris* v. *Harris*, 2 Hagg. C. 149.

It does not differ much whether words of serious menace, importing bodily harm to the wife, be addressed to herself, or to third persons; the

test is, if they raise reasonable apprehensions; indeed, they carry some additional weight if they raise apprehension in others, *Ib.* 776.

Where the husband was in the habit of putting himself into passions, of following his wife from room to room, abusing her, calling her by the most opprobrious names, accusing her of adultery and incest, this was held to be not mere abuse, but to imply actual menace, though the Court hesitated whether alone, it would constitute a sufficient ground for a separation, *Otway* v. *Otway* 2 Phill. 97.

Where the husband threatened to cut his wife's arm off, and beat her brains out with it, and on another occasion within a few days of her confinement, to pull her out of bed and kick her up and down the room, and once seized a red-hot poker and brandished it, and threatened to run her through with it, and often attempted to strike her: though the parties had been separated three years, and the husband had been bound over to keep the peace towards her, the Court held that the facts were of a nature to found a case of legal cruelty, *Hulme* v. *Hulme*, 2 Add. 27.

Where the husband frequently fell into violent passions, at which times he abused her and called her names, by which means he had so excessively frightened her as to occasion several fits of sickness; and when she was sick, he refused her all proper assistance, and in every respect

behaved as a very bad husband, except beating her, with which he was not charged; had left her on the day of marriage without consummating, and did not come to cohabit for several months, adultery being also proved, the Court held this sufficient evidence of cruelty coupled with adultery whereon to ground a divorce *a mensâ et thoro*, *Robinson* v. *Robinson*, 2 Add. 27.

A wife is not entitled to a divorce for cruelty unless it appear that she is a person of good temper, and has always behaved well and dutifully to her husband, *Taylor* v. *Taylor*, 2 Lee, 172; but to found a suit for cruelty it is not necessary that the conduct of the wife should have been entirely without blame. For the reason which would justify the imputation of blame to the wife will not justify the ferocity of the husband, *Holden* v. *Holden*, C. 459.

There may be cases provoked by the wife, but unduly visited by the husband, in which the Court would not refuse to interfere; but if the conduct of the wife is inconsistent with her duties, and provokes the just indignation of the husband, she must seek the remedy in the change of her own manners. *Harris* v. *Harris*, 2 Hagg. C. 155; *Best* v. *Best*, 1 Add. 423.

Where in a suit for divorce by reason of cruelty, at the instance of the wife, the wife put herself in violent passions, said provoking things to the husband, refused to come to dinner, sent

irritating messages to him by his child, locked him in his room, and aimed a blow at him, the Court refused to interfere, holding a wife guilty of such conduct not entitled to complain, *Waring* v. *Waring*, 2 Hagg. C. 158, S. C. 2 Phill, 132.

Where the wife refused the husband the keys of the wine-cellar; and where there was no reason to impute any intention other than that of obtaining what he had a right to possess, and which was illegally withheld, the Court said a husband is not to be deprived of his marital rights because a wife pertinaciously resists them; and in the course of that resistance encounters accidental injuries which were never meant to be inflicted, *Oliver* v. *Oliver*, 1 Hagg. C. 372.

Nor is it any defence to a charge of cruelty against the husband, that the wife withdrew herself from his bed. It does not take off the legal effect of cruelty, *Saunders* v. *Saunders*, 1 Rob. 565.

By Wife to Husband.—Where the wife struck the husband, and called him opprobrious names in the presence of his servants and children, the Court decreed a separation by reason of her cruelty, *Kirkman* v. *Kirkman*, 1 Hagg. C. 409.

Where the husband treated his wife unkindly, refused to cohabit with her, and had been convicted of an indecent assault upon his apprentice, and of attempting to persuade him to permit him to take indecent liberties with him, the Court

granted a separation, it being *per quod consortium amisit*, *Mogg* v. *Mogg*, 2 Add.

Where the husband was convicted of an assault with intent to commit an abominable crime, the Court granted the sentence of separation, *Bromley* v. *Bromley*, Deleg. 1793, 2 Add. 158, C.

Semble, indecency of such a nature whether amounting to the greater or merely the minor offence, is *cruelty*, *Mogg* v. *Mogg*, 2 Add. 293.

The communication of the venereal disease to the wife, or the attempt to cohabit with her when knowingly so affected, is malignant cruelty, *Popkin* v. *Popkin*, 1 Hagg. 765; *Collett* v. *Collett*, 1 Curt. 679.

The attempt to debauch his own woman-servants is a strong act of cruelty on the part of the husband, though, perhaps, not *alone* sufficient for separation, *Popkin* v. *Popkin*, 1 Hagg. 768 (note).

Where the husband sent away the wife's horses (her separate property) for sale, forcibly carried her to, and confined her in, her room; afterwards attempted to force her back there; formed an adulterous connexion with her maid; and when remonstrated with, refused to dismiss her; deposed his wife from the management of his family, and vested it in this person, and deprived his wife, in order to distress her, of the care of her child, it was held to be clearly deliberate cruelty; and it was not condoned by the wife's remaining

in the house from her love of her offspring until he deprived her of its custody, *Smith* v. *Smith*, 2 Phill. 207.

That the husband deprived the wife of her separate property is not pleadable as an act of cruelty, *aliter* as to her wearing apparel and the ornaments of her person, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 775 (note).

Where the husband forcibly entered, and took possession of the house in which the wife had been for the space of twenty days living *de facto* separated from him, it was thought a material fact in a suit of separation by reason of cruelty, *Lockwood* v. *Lockwood*, 2 Curt. 301.

It is pleadable that the husband compelled the wife by threats and by holding up his clenched fists to attend at a certain place for a certain purpose; but the Court will not inquire into the fact that she did there execute an assignment, under the influence of duress, of her separate property; for the parties can resort to the proper court, which would invalidate the act, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 776 (note).

A complaint of ill-usage, made *recenti facto* is evidence; for otherwise the husband need only maltreat his wife while they are alone, to debar her from redress, *Lockwood* v. *Lockwood*, 2 Curt. 293; *Dysart* v. *Dysart*, 1 Rob. 114.

It is often impossible to produce evidence of what occurs between husband and wife, conse-

quently admissions, whether in words or by the absence of denials, are the best and most credible testimony the *res gestæ* can, under the circumstances admit of, *Saunders* v. *Saunders*, 1 Rob. 558.

It is not cruelty in a husband not to allow his wife a monthly nurse in her confinement, nor not to supply her with a regular number of meals, nor to confine her in a workhouse, nor to prevent her from coming into any other room than her bedroom, except for meals; nor that he gave her boiled beef to eat, which had been expressly forbidden by her medical attendants, nor that he came home intoxicated, unless he committed some act of personal violence, *Evans* v. *Evans*, 2 No. Ca. 475.

When the husband refused to have his child baptized, assigning as his reason that he considered infant baptism wrong, it was held not to be cruelty, *Curtis* v. *Curtis*, 27 L. J., P. & M. 76.

Blasphemy and immorality cannot be alleged as cruelty, *Suggate* v. *Suggate*, 28 L. J., P. & M. 46.

The Court will not judge of the reasonableness of a prohibition by the husband of the wife's holding intercourse with her own family, nor regard it as a circumstance of cruelty, *Waring* v. *Waring*, 2 Hagg. C. 159, S. C. 2 Phill. 132; *Neeld* v. *Neeld*, 4 Hagg. 269; though it may tend to illustrate general temper. That "the husband

lay in a separate bed" is not pleadable as an act of cruelty, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 775; *Orme* v. *Orme*, 2 Add. 385; *Evans* v. *Evans*, 2 No. Ca. 474.

That the husband locked the wife out of his bed-room until most unreasonably late hours, however vexatious is not alone cruelty, *Dysart* v. *Dysart*, 1 Rob. 117.

Cruelty to children in the presence of their mother may be cruelty to her, *Suggate* v. *Suggate*, 28 L. J., P. & M. 46.

Where the husband made a groundless and malicious charge against his wife's chastity, which he did not attempt to plead or prove in the suit, and under that pretence had shut his door against her, this was said to be matter admissible in a suit against him for a separation by reason of cruelty, *Durant* v. *Durant*, 1 Hagg. 769.

Spitting in the wife's face is cruelty, *Cloborn's Case*, Hetley, 149; (*a*) *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 776 (note); *Saunders* v. *Saunders*, 1 Rob. 565: *Curtis* v. *Curtis*, 27 L. J., P. & M. 77.

That the husband fired a pistol at or near the

(*a*) This case is referred to by Lord Stowell, who says, this was the only cruelty alleged; but the words in the report are, "He gave her a box on the ear, and spat in her face, and whirled her about." The prohibition seems to have been refused, because the husband had not pleaded justification.

wife, in order to terrify her, is admissible, *Cocksedge* v. *Cocksedge*, 1 Rob. 97.

Cruelty, Proof of.—Where the wife's screams were heard—she was found in a helpless, state—and her husband then treated her with utter indifference, such facts strengthen other evidence, but are not themselves proof of cruelty, *Saunders* v. *Saunders*, 1 Rob. 557.

Where the husband often declared it to be his wish and object to drive his wife from his house it was deemed evidence of weight, as showing motives such as would influence his conduct *Ib.* 559.

That the husband was in the habit of absenting himself from his wife, of returning home in a state of intoxication, and of using threats of violence against her is admissible, *Cocksedge* v. *Cocksedge*, 1 Rob. 96.

Defence—Affectionate letters from the wife are not necessarily inconsistent with cruelty on the part of the husband, *Saunders* v. *Saunders*, 1 Rob. 565.

Condonation is, of course, a defence. See page 122, *et sequ.*

Cruelty pleaded in reference to Adultery.—The wife cannot plead cruelty in bar to a suit for divorce by reason of adultery, the *delictum* is not of the same kind, *Chambers* v. *Chambers*, 1 Hagg. C. 452; *Harris* v. *Harris*, 2 Hagg. 411; *Chettle* v. *Chettle*, 3 Phill. 507; *Moorsom* v. *Moorsom*, 3

Hagg. 92. But it may be pleaded as introductory to the history of the adulterous intercourse, *Arkley* v. *Arkley*, 3 Phill. 500. But if the husband and wife both failed in making out a charge of adultery, and the wife had in addition pleaded cruelty, Sir H. Jenner thought that the plea might be admissible, in order to avoid multiplicity of suits, as the foundation of a sentence of separation by reason of cruelty; though in discussing the issue as to the adultery, it would be irrelevant, *Eldred* v. *Eldred*. * * 2 Curt 382.

There is nothing in any of the previous authorities which militates against this dictum, *Cocksedge* v. *Cocksedge*, 3 Rob. 94.

If adultery be pleaded by the wife in bar to a suit at the instance of the husband by reason of adultery, it is competent for the wife to plead cruelty as introductory to the history, and this is not liable to the objection; it shews that the affections of the husband were alienated. Cruelty is certainly no bar to adultery; but, in this view, it is admissible, *Arkley* v. *Arkley*, 3 Phill. 500 (note).

It is not pleadable that the cruelty was committed with the ulterior design of getting rid of the wife by driving her to commit adultery. It is not connivance. But there may by possibility be a different case where the husband's cruelty may lead directly up to the wife's adultery;

there it might be different, *Dillon* v. *Dillon*, 3 Curt. 94.

In a late case, Dr. Lushington said, it *may* perhaps, be a more doubtful point whether, where the husband brings a suit for adultery, the wife may not plead cruelty, alleging that she does not plead it in bar, but that she denies the guilt imputed to her, and claims, in the event of it being unproved, to be separated from him on account of his cruelty; but I am of opinion that it ought not to be doubtful; for, according to my impression of the law, where adultery is charged against the wife, she is not entitled to plead cruelty alone, either in bar or for the purpose of saying: "I am innocent of adultery, and if I prove cruelty, I am entitled to a separation, "I am not aware of any precedent for the admission of such a plea. A wife is not prejudiced by its rejection. If adultery is not proved against her, her right to sue on the ground of cruelty, will not be prejudiced, and the husband will not be prejudiced by having failed in his charge of adultery . . If it were admitted, the husband might be put to unnecessary expense, *Cocksedge* v. *Cocksedge*, 1 Rob. 92. In this case the previous one of *Scrivener* v. *Scrivener* (unreported) was discussed, and the principle affirmed. In that case the wife did not plead adultery, but endeavoured to raise a prejudice against her husband by charges of harsh

conduct, concluding with a denial of her own adultery, and the Court refused to allow any allegations to be pleaded except those relating to the charge of adultery.

If a party institutes a suit for restitution of conjugal rights, the presumption is inevitable that there was at that time no apprehension of personal violence; but, though improbable, still it is not altogether impossible that extraordinary cases might occur, in which the wife would hazard her personal safety for ulterior objects, rather than separate: therefore, where legal cruelty has been committed prior to a suit for the restitution of conjugal rights, the institution of such a suit would not be an absolute bar to a sentence of separation, *a fortiori* if acts happening anterior to the suit for restitution—but which are brought forward at a subsequent period—are not precisely in the nature of legal cruelty, yet of considerable harshness and severity, they ought not to be excluded, *Neeld* v. *Neeld*, 4 Hagg. 268.

Where the wife (then living apart from her husband) refuses to accede to the terms in proposed articles of separation, it creates no presumption against her, *Lockwood* v. *Lockwood*, 2 Curt. 299.

The charge of having committed incest is not *per se* sufficient to constitute legal cruelty; but as charges of adultery are allowed to be pleaded in conjunction with other acts of cruelty, so a

charge of incest, combined with other circumstances, cannot be rejected, *Gale* v. *Gale*, 2 Rob. 421.

DELAY.

The first thing which the Court looks to when a charge of adultery is preferred is the date of the charge relatively to the date of the criminal fact charged, and the date of its becoming known by the party alleging it: because, if the interval be very long between the date and knowledge of the fact, and the exhibition of them to the Court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It, therefore, demands a full explanation of this delay, *Mortimer* v. *Mortimer*, 2 Hagg. Con. 313.

Where a petition was presented to the Court stating that the depositions were lost, and praying that the cause might be heard on official copies, it was objected that there had been such delay as amounted to condonation—the suit was commenced in 1775, proceeded till 1777, and from that time nothing had been done till 1787. The Court said, it looked with jealousy on matrimonial cases, particularly where brought by the

wife; and dismissed the suit on the ground of delay, *Betcher* v. *Betcher*, Cons. Court of London, Mich. 1787, cited 2 Phill. 155.

Where the suit began Michaelmas term, 1812, and no further proceedings were taken until Michaelmas term, 1813, this was said to be such a delay as might have induced the Court *ex mero motu* to have dismissed the suit; but that it was certainly sufficient to do so the case being weak and the form imperfect, *Walker* v. *Walker*, 2 Phill. 155.

It has been held admissible in the Ecclesiastical Courts to plead facts which will account for the husband's delay in instituting proceedings, and as furnishing ground why the husband should not be precluded by reason of laches or acquiescence in his wrong, from proceeding in his suit; but it is not necessary to give evidence in support of such allegations, unless the wife set up such a defence as may render it necessary, *Richardson* v. *Richardson*, 1 Hagg. 10.

A husband who, on discovering his wife's adultery, commences a suit against her for divorce, but abandons it for want of funds, is not thereby barred from seeking a divorce at a subsequent period, *Coode* v. *Coode*, 1 Curt. 755.

Where a fact of improper behaviour, not absolutely criminal was alleged in 1820 to have occurred "in the latter end of 1810," the Court said, "She can cross-examine. The Court will

scrutinize with due strictness, and with fair allowance for the difficulties of her case; and it might deem such a fact, if it stood alone, hardly sufficient to induce its admission; but, after all, it is the duty of the Court to consider how the delay originated, so as to produce this laxity in description, and whether she has not herself, in a great degree, created the difficulty of which she now complains." *Mortimer* v. *Mortimer*, 2 Hagg. C. 314.

Mere lapse of time is no bar in a woman, as various considerations may induce her to submit. It is no condonation, *Popkin* v. *Popkin*, 1 Hagg. 766. *Vide*, however, 20 & 21 Vict. c. 85, s. 91.

A woman not bringing her complaint immediately on discovery of the adultery is not barred from afterwards laying her case before the Court, *Ferrers* v. *Ferrers*, 1 Hagg. C. 135. (See also the cases there cited).

Where the parties separated under articles in 1853, and the husband went away and never violated the conditions of the articles, and the wife petitioned the New Court for judicial separation on the ground of cruelty, Cresswell, J. O., said, either she had no ground for then presenting a petition to the Old Court, or she advisedly abstained and preferred a private arrangement, I do not say the lapse of time is an absolute bar, but, I think that this, taken in connection with the deed of separation, is not a *bonâ fide* applica-

tion for the wife's protection. Petition dismissed. *Matthews* v. *Mattkews*, 34 L. T. 61.

There is no *legal* limitation of the time within which the husband may bring his suit, *Nash* v. *Nash*, 1 Hagg. C. 142; but it is matter for the observation of the Court, *Mortimer* v. *Mortimer*, 2 Hagg. C. 313.

Even in the case of the husband it is not invariably expected that he should show the time when the misconduct first came to his knowledge. It might be prudent and expedient to the success of his suit that he should do so, but it is not absolutely necessary; but forbearance in the wife unless where living in the same house with the husband's concubine, or some other equally glaring act, will not bar her remedy, *Kirkwall* v. *Kirkwall*, 2 Hagg. C. 279.

DESERTION.

Malicious desertion or "desertion without cause for two years or upwards," is a ground of judicial separation (20 & 21 Vict. c. 85, s. 16); but it was held before the passing of that act that such desertion is no bar to a divorce *a mensâ et thoro*, and the Court added: "In some countries desertion is a substantive ground of divorce at the prayer of the wife against the husband; but not even there, that I am aware of, does it license adultery on the part of the wife, or preclude

the husband from a sentence of divorce on proof of its commission, *Sullivan* v. *Sullivan*, 2 Add. 302; *Reeves* v. *Reeves*, 2 Phill. 125; *Morgan* v. *Morgan*, 2 Curt. 691; *Dillon* v. *Dillon*, 3 Curt. 94.

The authority to decree a judicial separation on the ground of desertion is a new one created by the statute 20 & 21 Vict. c. 85, s. 16.

And in that it differs from cruelty and adultery; and, therefore, if a husband who had deserted his wife before the Act, made, also *before the Act*, a *bonâ fide* offer to return, he would thereby bar the wife of any remedy by petition; but it would, of course, be otherwise since the passing of the Act. In other words section 16, is not retrospective, *Brooks* v. *Brooks*, 28 L. J., P. & M. 38.

The word desertion may not in all places mean the same thing. By section 21 provision is made for the protection of a deserted wife's earnings. There it means that the husband has absented himself, but has left the wife unprovided for, and such desertion must continue at the time of the protecting order: so that a *bonâ fide* offer to return and provide for her would take away her right to the order. By section 27, provision is made for dissolution of marriage on proof of "adultery coupled with desertion, without reasonable excuse, during two years and upwards." Here the Legislature could not have meant that the wife should be deprived of the right which had accrued by a subsequent offer of the husband

to return and cohabit with her, for by so doing she would condone the adultery. This is a compound offence, no part of which could be blotted out without condonation by the wife The 16th section gives a minor remedy for either portion of the compound offence, viz.: judicial separation for adultery, or for desertion without cause for two years; and there is no ground for saying that the husband can obliterate either, without condonation by the wife, when separate more than when they are combined. Either gives the wife a right of which she cannot be deprived without her concurrence; and the *bonâ fides* of any offer to return makes no difference, *Cargill* v. *Cargill*, 27 L. J., P. & M. 69.

Desertion without cause for two years and upwards, is a ground for judicial separation at the suit of either husband or wife.

The word "Desertion" necessarily implies that the act relied on is done contrary to the will of the person charging it. *Per* Cockburn, C. J., *Ward* v. *Ward*, 27 L. J., P. & M. 64, and Cresswell, J. O., *Thompson* v. *Thompson*, 27 L. J., P. & M. 68.

The fact of separation is not conclusive proof of desertion, though it is evidence of it, *Ward* v. *Ward, ubi sup.* Nor is the fact of a man leaving his wife to live with another woman, *Ib.*

In November 1843, C., who resided at Birkenhead, went to Birmingham, where his wife joined him, and after living with him a few days at an

inn, went, by his direction, to stay with a friend, he saying he would join her next day, she having no notion that he did not intend returning home. He did not come; and after remaining a fortnight, she returned to Birkenhead, where she found an execution had been put in. She wrote several letters to him, which he did not answer, and the furniture was sold under the execution. She then went into lodgings at the expense of her friends, and in February two persons went to Birmingham, where the respondent then was, and endeavoured to induce him to return, but he refused to do so; and in May she took a situation as a governess, not having seen or received anything from him since 1843. In the same month of May, he wrote to the petitioner vaguely intimating that she might rejoin him, to which she replied that "when he could place her in as good a position as she could keep herself in by her own industry, it would be time enough to talk about doing so." In 1848, he wrote to her, bidding her "farewell for ever," it was held that there was a desertion from the first; and, as he made no definite offer to provide another home for her, and did not so provide one, she was entitled to a decree, *Cudlipp* v. *Cudlipp*, 27 L. J., P. & M. 65.

Where the respondent had been charged by his wife before a magistrate with assaulting her, and was bound over to keep the peace towards her,

and thereupon immediately left her without money, and she was quite willing that he should go, the Court did not feel quite clear that the charge of desertion had been established, *Ward* v. *Ward*, 27 L. J., P. & M. 63.

Where the husband, having failed in business, sent his wife and children to her father's house, and went up to London to seek employment, whence he wrote two letters in affectionate terms, expressing his hope of soon being able to support her and her children, as he also did in an interview he had with her; and about a month later he wrote again, complaining of her not answering his former letter, and telling her she was in duty bound to let him know how his children were, which she also left unanswered. He wrote a fourth—rather an angry one—saying that if she did not answer it she would not hear from him any more, which she also left unanswerd. He did not see her for eight years, when he saw her, said he had money, and should come for her next day, but did not do so. In answer to the Court, she said she did not answer the letters because her father would have opposed it; and it appeared that he did not wish that she should have further communication with her husband. It was held that having in the first instance necessarily absented himself for the sake of employment, he did not then desert her, and that considering his wife's conduct, his subsequent absence

could not be regarded as desertion within the meaning of the statute, *Thompson* v. *Thompson*, 27 L. J., P. & M. 65.

When the husband, a minor, clandestinely married his wife, and a few days after was removed by his friends to the continent, and subsequently to India, leaving her penniless, this abandonment was held to be no defence in a suit by him against her by reason of adultery, *Morgan* v. *Morgan*, 1 No. Ca. 32. And Dr. Lushington there said that, according to his own MS. notes in *Reeves* v. *Reeves*. Sir J. Nicholl had distinctly held that even *wilful* desertion was no defence. See also *Sullivan* v. *Sullivan*.

But now, even in case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, still it is not bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery; or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery, 20 & 21 Vict. c. 85, s. 31, *Coulthart* v. *Coulthart*, 28 L. J. 21; and "wilful misconduct"

must be taken to be such misconduct *after* marriage, *Allen* v. *Allen and D'Arcy*, 28 L. J., P. & M. 81.

Where the petitioner, aged sixteen, married a man of thirty-six clandestinely, and was immediately after the marriage separated from him by her friends, and had never cohabited with, or seen him since, the Court held that, she having been entrapped into the marriage, even if she had been married by license obtained on her oath, as she might have done this, under the influence of her husband, had not "wilfully deserted" him, and decreed a dissolution on the grounds proved.—*Du Terreaux* v. *Du Terreaux* 28 L. J., P. & M. 95.

In answer to a defence of desertion without provocation on her part, set up by the wife in a suit for divorce by reason of adultery, promoted by the husband, he may fairly set up antènuptial misconduct on her part, discovered subsequently to their marriage in his justification, *Perrin* v. *Perrin*, 1 Add. 4.

The desertion must be *clearly* proved to be against the will of the wife, *Smith* v. *Smith*, 28 L. J., P. & M. 27.

Where the petitioner, being a clerk in the Post Office, was married in 1849 and in 1850 was convicted of stealing a letter, and sentenced to ten years' transportation, and, although he could not supply his wife with money, he for two years kept

up an affectionate correspondence with her In 1853 she formed a criminal intimacy with the co-respondent, with whom she afterwards lived in concubinage. On his liberation, and the passing of the Divorce Act, he filed his petition for a dissolution of marriage. It was held that,—although this adultery would never have been committed but for the petitioner's misconduct, yet, although a *sine qua non*, this not being a *causa causans*, and the misconduct being neither directly or indirectly contemplated by the husband as likely somehow to contribute to his dishonour, — it had not "conduced" to the adultery within the 20 & 21 Vict. c. 85, s. 31, and *per* Cresswell, J. O., that the wilful neglect or misconduct must mean neglect of the wife in the strictest sense; and so misconduct towards her must mean towards her personally, and not merely misconduct towards society indirectly affecting her, *Cunnington* v. *Cunnington and Noble*, 34 L. T. 46.

DISSOLUTION OF MARRIAGE.

Where the wife petitions for a decree of dissolution of marriage on the ground of "bigamy with adultery," under 20 & 21 Vict. c. 85, s. 27. *Semble, per* Pollock, C. B., that "bigamy with adultery," in that section, means adultery with the person with whom the bigamy is committed;

and, consequently, that, where it was proved by an examined copy of the marriage register, and by proof of the respondent's handwriting, that he had married again, leaving his wife, the petitioner should also have proved adultery with the person with whom the form of marriage was so gone through, as that they lived together as man and wife; and that it would not be sufficient to prove a bigamous marriage with one woman and adultery with another. *Per* Pollock, C. B., *Horne* v. *Horne*, 27 L. J., P. & M. 50.

Where a sentence of dissolution of an English marriage has been pronounced by a foreign court on a ground on which it was not liable to be dissolved in England, it was held that such a sentence cannot be recognised in the English courts as a dissolution of the marriage, *Rex* v. *Lolley*, R. & R. 237; and, as it is not otherwise a sentence of separation from bed and board and mutual cohabitation than by dissolving the marriage, it cannot be recognized in our courts as equivalent to a sentence of judicial separation, *Robins* v. *Dolphin*, 27 L. J., P. & M. 24.

Where an Englishman, domiciled in England, married an English lady, afterwards separated from her by deed, and fifteen years afterwards went to Scotland, and having there committed adultery, his wife followed him, and obtained a decree from the Scotch Court dissolving the marriage, on the strength of which he married again,

it was held—there being no allegation or evidence that he had given up his English house, or had left England without intention of returning, or gone to Scotland with the intention of remaining there—the case was governed by *Rex* v. *Lolley*, R. & R. 237, and *Conway* v. *Beazley*, 3 Hagg. 639; and that the marriage was not dissolved, *Robins* v. *Dolphin*, 27 L. J., P. & M. 24.

Where adultery and cruelty were both charged in a suit for a divorce promoted by the wife against the husband, it was held unnecessary to prove the cruelty, *Smith* v. *Smith*, 2 Phill. 67. It seems, therefore, that the Court of Divorce and Matrimonial Causes will, in a suit for a divorce promoted by the wife against the husband, under 20 & 21 Vict. c. 85, s. 27, by reason of incestuous adultery, or of bigamy coupled with adultery, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro*; or of adultery coupled with desertion, on failure of the double proof required for a sentence of divorce, nevertheless pronounce a sentence of judicial separation in the same suit, on proof of adultery only, or of cruelty only, as the case may be; for it has been held that where the suit is for dissolution, judicial separation may be granted, *Smith* v. *Smith*, 28 L. J. P. & M. 17.

But where a petition is addressed in the first instance to the "Judge Ordinary" for any matter

within his jurisdiction, there is some difficulty as to obtaining a sentence of divorce, see *post*, Appendix, note to Form 24.

ERROR.

This is a ground for invalidating a marriage and is canonically of four sorts:—

1. *Error de Personâ*, as the marrying A. in mistake for B.

2. *Error Conditionis*, as the marrying a slave believing her to be free.

3. *Error Fortunæ*, where one is deceived as to a woman's fortune.

4. *Error Qualitatis*, where there is some error as to rank or character of one of the parties.

Of these the first is the only one recognised by our law as invalidating a *factum* of marriage. See *post* "Nullity of Marriage."

FORCE.

Matrimony contracted by force is, of course, from the very definition and essence of the marriage contract, as arising from the *consent* of parties, void, *ipso jure*, for *consensus non concubitus facit matrimonium*.

The menace or other means employed must, however, be such as would reasonably create an

impression of fear in the mind of a man or woman of average courage and resolution ; and such fear, it would seem, must be either of death or some actual bodily harm, otherwise it will not operate to annul the contract. But, further, see *Harford* v. *Morris*, 2 Hagg. C. 423, *et seq.* See also *Wakefield's case*, McQueen's H. L. Prac. 426.

Matrimony contracted under the influence and by reason of fear is null and void *ipso jure*. But this must be such a fear as may reasonably happen to a person of fair resolution, and must include either fear of death or else bodily torment; and even then if spontaneous cohabitation be continued for any length of time, the cause of fear is presumed to cease, and the marriage becomes good, Ayliffe Parergon. X. lib. 4, tit. 1. cap. 6 and 21.

IDENTITY.

Identity must be proved by extrinsic evidence, and that more especially when confession forms any part of the evidence, *Williams* v. *Williams*, 1 Hagg. C. 305.

It is a clear rule, founded on the necessity of the case, that the identity must be proved by other testimony than that of the parties themselves ; it must be proved by witnesses who can speak from their own personal knowledge, *Searle* v. *Price*, 2 Hagg. C. 190.

Where a suit is for *dissolution of marriage*, the Court, having no power under the Acts whereby it is constituted, see 20 & 21 Vict. c. 85, s. 45, and the old rules of the Ecclesiastical Courts not applying to such suits, cannot order the attendance of a respondent in order to identification by witnesses, *Hooke* v. *Hooke*, 28 L. J., P. & M. 29.

IMPOTENCY.

Of this there are two kinds—*Frigidity*, or the having a latent incapacity for coition, and *Malformation*, which affords visible proof of incapacity. In the first case, triennial cohabitation is necessary to found proceedings for a divorce, *Lewis* v. *Lewis*, Arches, 1702, quoted 2 Lee, 579.

In the second case, triennial cohabitation is not required, *Welde* v. *Welde*, 2 Lee. 578.

If there be a doubt, the parties must cohabit three years; and if in that time the marriage be not consummated, the law presumes impotency, Nov. 22, tit. 6, *de Impotent.*

An inspection on which virginity is returned, and the woman's oath, is full proof. Decret. 4, 15, 7, & 2, 19, de Prob. c. 4; but *Judicium obstetricum est fallax.* Dec. Rot. Rom. decis, 14.

It is necessary that it should appear to the Court not only that the man is impotent but that he is likely to continue so; for if there is a probability of capacity, the Court cannot separate the par

ties, *Welde* v. *Welde*, 2 Lee, 586. Two points are essential to be proved by the complaining party; first, that there was an impediment to consummation existing at the time of marriage; and secondly, that it is incurable, *Brown* v. *Brown*, 1 Hagg. 524.

Case of mal-administration

Inspection was refused until after triennial cohabitation, even although the wife specified a visible defect in the husband, *Aleson* v. *Aleson*, 2 Lee, 576. It is said the law requires that the party's answers should be given in, or that he should submit himself to medical inspection. If this were so the man would have only to withdraw beyond reach of the process of the Court, and thus defraud the woman of her remedy. The law never imposed such difficulties on any Court, *Pollard* v. *Wybourn*, 1 Hagg. 729.

The subject itself is fair ground for complaint. Natural malformation is rare, still instances do occur; sometimes they are without the knowledge of the party. Where it is with the knowledge it is a gross fraud and a grievous injury. In either case, the law provides a remedy which the Court will apply on complaint being made, *Briggs* v. *Morgan*, 3 Phill. 331. If there is just reason either to suspect the truth of the statement, or to think the injury inconsiderable, the Court will hesitate before it descends to modes of proof which are painful, *Briggs* v. *Morgan*, *ubi supra* 330.

If the case be one of supervening infirmity

from declining years, the Court will not interfere, *Per* Lord Stowell, *Briggs* v. *Morgan*, 3 Phill. 332; *Brown* v. *Brown*, 1 Hagg. 525 (*semble*).

The rights and duties of both parties are co-equal, whether the failure be on one side or the other. The evidence may be uncertain in its very nature; but though the expectation of infirm evidence may induce greater caution, it is not to preclude the parties from having recourse to such modes of proof as the law allows, *Briggs* v. *Morgan*, 3 Phill. 328. *Triennalis cohabitatio* is not necessary in such a case, for where the infirmity may be ascertained at once, this cannot be required. All the great authorities, ancient and modern, subscribe to this, which is the rule of reason, *Briggs* v. *Morgan*, 3 Phill. 329.

A triennial cohabitation does not require a living together *de die in diem*; but a general cohabiting only, as is usual between married persons, *Welde* v. *Welde*, 2 Lee, 579; but it is requisite that, if the parties are long separated, the man be restored as to that time during which he has been absent, *Ib.* 586.

Where the husband instituted a suit of nullity of marriage by reason of his own impotence, the Court said: "No instance has been found of a man seeking to set aside his marriage on account of his own incapacity. It is incredible that he should have lived forty-five years in ignorance of a bodily defect, which he alleges to be evident on

inspection. The presumption is in favour of the marriage; besides there is a subsequent cohabitation of seven years before the suit is brought; he must have sooner discovered it. The maxim applies *cur tamdiu taccui?* He has defrauded his wife into a marriage, has acquired her property, kept her for a long period in a condition of perpetual injury, and now seeks to relieve himself of the burden of maintaining her. This is merely a voidable marriage, and is so laid down by Blackstone. It is a maxim that no man shall take advantage of his own wrong. There is no instance of a suit brought by a party alleging his own incapacity." Suit dismissed, *Norton* v. *Seton*, 3 Phill. 147.

The sentence in suits of impotency being merely declaratory of nullity, and the marriage in such cases being void *ab initio*, the fact of the complaining party not having in a previous matrimonial suit controverted an allegation pleading lawful marriage is barred thereby from afterwards promoting a suit of impotency, *Guest* v. *Shipley*, 2 Hagg. C. 321.

Where the husband confessed his own impotency, but was supported by the evidence of medical men, and there was clearly no collusion between the parties, the sentence of nullity was pronounced for, *Greenstreet* v. *Cumyns*, 2 Phill. 10.

Where in a suit of nullity of marriage by reason of natural malformation, the medical inspec-

tor's evidence showed that there might be connexion of a very imperfect character from the peculiar and unnatural formation of the parts, that the parts had considerably elongated, and might do so still more; but that they must always remain in a deformed and unnatural state, forming an impervious *cul de sac*. Held, that as the woman was not, and could not be made, capable of more than an incipient, unnatural, and imperfect coition, the marriage was void; but that this would not have been the case had there been a *vera copula*, though without the power of conception, *D.* v. *A.*, 1 Robt. 279.

In a suit of nullity of marriage by reason of natural malformation, where there is no reason to suspect insincerity or fraud, mere lapse of time alone is no bar to the suit, *B.* v. *M.*, 2 Robt. 580.

In suits of this nature the rule requiring a triennial cohabitation is not absolutely binding. It is a convenient and fitting rule, and one not to be departed from on slight ground; the object of it is to provide that sufficient time may be afforded for ascertaining beyond a doubt, the true condition of the party complained of *U.* v. *F.*, 2 Robt. 614. And the same was held where, after two and a-half years' cohabitation, the man was reported impotent, *quoad hanc*, though his impotency was not physically apparent, *N.* v. *M.*, 2 Robt. 625.

Where there had been sufficient triennial coha-

bitation, and there was no sufficient proof of the virginity of the woman, but the alleged husband admitted that the marriage had not been consummated, and there was evidence of his having admitted his incapacity, the Court pronounced the marriage null, and condemned the defendant in the costs without any inspection, *Sparrow* v. *Harrison*, 3 Curt. 16.

It is competent for a man to bring a suit of nullity of marriage against a woman for natural malformation, *Briggs* v. *Morgan*, 3 Phill. 325.

The Court is not disposed to encourage such causes where promoted by the husband without an evident necessity, the proofs being manifestly such as are against the modesty of the sex, *Guest* v. *Shipley*, 2 Hagg. 321.

Where the woman was near fifty, the husband a little younger, and he did not make any complaint until sixteen months after marriage; she was a widow, and swore to having had intercourse with her first husband during eighteen years, which was supported by other evidence, it was also alleged, but proof was pronounced to have failed, that she lived on bad terms with her former husband, and that he cohabited with another woman; the husband prayed an inspection. The proceeding was dismissed, the Court being unwilling to interfere where the parties were of such age, and also because of the delay in making the complaint, and the want of truth in

the other allegations, *Briggs* v. *Morgan*, 3 Phill. 329.

A man of sixty marrying a woman of fifty-two should take her *tanquam soror*, *Brown* v. *Brown*, 1 Hagg. 524.

INCEST.

This was an offence punishable by the Ecclesiastical Courts. For the purposes of this Court it is only taken notice of as forming a ground of divorce when taking the shape of "incestuous adultery," that is adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity, 20 & 21 Vict. c. 85, s. 27.

As to what are the prohibited degrees, see *ante*, 107, and the table in the Book of Common Prayer, and *post* "Nullity of Marriage."

We may here add, as regards affinity, that there is none between the kindred of the husband and the kindred of the wife, for it relates only to and terminates in them, respectively. And consanguinity or affinity is as much an impediment in the case of bastards as of legitimates; for although a bastard has no relations for *civil* purposes he has for moral purposes, *Reg.* v. *Chaffin*, 3 Salk. 66; see also 1 Hagg. 352.

The evidence must show the nature of the

cohabitation and the relationship of the parties, *Blackmore* v. *Brider*, 2 Phill. 361.

INTEREST.

It was competent, in the Old Court, to third parties having an interest in a marriage to intervene in all suits of nullity of marriage, for its protection. A slight interest is sufficient to enable a party to bring a suit of this description, *Faremouth* v. *Watson*, 1 Phill. 355. Persons in remainder may bring suits of nullity to declare a marriage void by reason of consanguinity, *Maynard* v. *Heslerigge*, 1 Add. 16 (n.)

And now by the Legitimacy Declaration Act, 1858, the Court may cite such persons as it shall think fit in all proceedings for a decree declaring the legitimacy of the petitioner, or the validity of the marriage of his father or grandfather. See *post*, App. xxii.

Where an application was made for a decree to see proceedings to issue to parties having an interest, on mere verbal suggestions as to family settlements, the Court refused the application; but it would *probably* be inclined to accede to it if *duly* repeated in the event of the husband's giving a general negative issue to the libel, and so denying the marriage, *Montague* v. *Montague*, 2 Add. 372.

The committee of a lunatic has sufficient inte-

rest to entitle him to bring a suit as well of nullity of marriage as for adultery, *Parnell* v. *Parnell*, 2 Phill. 158.

The children by any marriage have, of course, an interest in any suit promoted for its nullity, *Wright* v. *Ellwood*, 2 Hagg. 600.

The public has an interest in ascertaining the *state* of the parties where the marriage is void, *Norton* v. *Norton*.

But where the father of the husband sought to set aside the marriage on the ground of lunacy at the time of marriage, but the husband was not alleged to be insane at the time of suit he was held to have no *persona standi*, *Turner* v. *Meyers*, 1 Hagg. 414 (note).

In cases of consanguinity, the public had an interest to abate a scandal. The criminal suit was open to every one; the civil suit to every one having an interest. In cases of consanguinity there is a reason for the interference of others, as the marriage can only be affected *inter vivos*.(*a*) Here there will be no such consequence, as the remedy may be pursued at any time (*b*).

In a cause of divorce where the alleged marriage is denied to be valid, the Court may *pro-*

(*a*) As the law then stood (1804), such marriages were voidable only; but they are now void by 5 & 6 Will. 4, c. 54, hence the same reasoning now applies to such cases as well as to those in the text.

(*b*) The marriage being void, *ab initio*.

bably, permit third parties, who have estates expectant, *inter alia* upon the issue of such alleged marriage being illegitimate, and who, consequently, are interested in the question of its validity to be cited "to see proceedings," so far as relates to the marriage, *Montague* v. *Montague*, 2 Add. 372.

JACTITATION OF MARRIAGE.

Jactitation of marriage is where a person falsely boasts or gives out that he is married to another, whereby a common reputation of their matrimony may ensue. On this ground the party injured may commence a suit against the other; and, unless the defendant makes out a proof of an actual marriage, he or she will be enjoined perpetual silence on that head, 4 Steph. Com. 9.

By 20 & 21 Vict. c. 85, s. 6, the jurisdiction in suits of this nature is given to the Court of Divorce and Matrimonial Causes; and by sect. 51, the Court has power to make such order as to costs as may seem just, and that without appeal, in like manner as it was said in the Ecclesiastical Court that, "the suit of jactitation is criminal in its nature, and if found against the defendant, he may be condemned in costs," *Hawke* v. *Corri*, 2 Hagg. C. 281. The Court is bound to receive such a suit for the protection of persons against the extreme inconvenience of unjust claims and

pretensions to a marriage which has no existence whatsoever. 'If a person pretends such a marriage, and proclaims it to others, the law considers it as a malicious act, subjecting the party against whom it is set up to various disadvantages of fortune and reputation, and imposing upon the public an untrue character, interfering, in many possible consequences, with the good order of society, as well as the rights of those who are entitled to its protection. It is, therefore, a fit subject of legal redress; and this redress is to be obtained by charging the supposed offender with having falsely and maliciously boasted of a matrimonial connexion, and upon proof of the fact, obtaining a sentence, enjoining him or her to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceedings, *Hawke* v. *Corri*, 2 Hagg. C. 285.

The allegation against the defendant is that she or he "has falsely and maliciously boasted and reported that *she* is married to *him*, whereas, in fact, no marriage has taken place: and that upon *her* being desired to desist from such conduct, *she* paid no attention, but continued falsely and maliciously to boast and report such a fact to the no small prejudice and injury of the complainant, *Ib.* 281.

The defences which may be raised in this suit are three:—It is obvious that the fact of having

made any such representations may be denied, in which case, if not proved, the accusation shares the common fate of other unfounded charges. Or, secondly, it may be admitted that such representations have been made, but that they are true; for that such a marriage had actually passed, and in such a way as to give the party a right to claim the benefit of it. In that state of things, the proceeding assumes another shape—that of a suit of nullity and of restitution of conjugal rights, on an inquiry into the rights, or an inquiry into the fact and validity of such asserted marriage; and it will depend upon the result of that inquiry whether the party has falsely pretended or truly asserted such a marriage. In the former case the Court would pronounce a sentence of nullity, and enjoin silence in future. In the latter, the court would enjoin the accuser to return to matrimonial cohabitation, unless it could be shown that some other reason was interposed to dissolve that obligation. A third defence of more rare occurrence is, that, though no marriage has passed, yet the pretension was fully authorized by the complainant; and, therefore, though the representation is false, yet it is not malicious, and cannot be complained of as such by the party who has denounced it, and that, although such party had withdrawn the authority before the making of the pretension complained of, *Hawke* v *Corri*, 2 Hagg. C. 285.

Where a man made a woman declare in writing that she was not his wife, it was held a strong circumstance in favour of the marriage, *Leeson* v. *Fitzmaurice*, Deleg. 4 March, 1732, cited, 1 Lee, 28.

Where J. pleaded a marriage in 1725, & M. pretended to have been married to the same man in 1724, J. insisted that M. was barred by never having claimed him; the Commissaries of Edinburgh admitted her to plead the marriage; J. appealed to the Lords of Session, who reversed the sentence of the Commissaries, which was however, affirmed on appeal to the House of Lords, 1 Lee, 28.

Where, after a Fleet marriage, the woman was reputed to be the man's wife, by his and her families, and, subsequently, he three times wrote to her to beg she would disclaim the marriage, and he on one occasion declared he was married to her; but, subseqently, married another woman, and was twice indicted for bigamy; but on one occasion the bill was not found, and on the second it was found, but no one appeared to prosecute—no step was taken by her for twenty-two years to establish the marriage—there was no cohabitation or consummation subsequent to the marriage—the Court gave judgment for the marriage, and against the suit for jactitation, *Walton* v. *Rider*, 1 Lee, 16. After a marriage alleged to have been irregular in Scotland, where the parties

had cohabited, and the promoter of the suit had acknowledged the woman, both verbally and in writing, as his wife, the suit was dismissed, *Wescome* v. *Dods*, 1 Lee, 59.

NULLITY OF MARRIAGE.

Whenever, for any of the reasons mentioned below, there are impediments to contracting a lawful marriage, the acts of the parties may be set aside by the decree of the Court either declaring the marriage to have been *null*, void *ab initio*, or where voidable merely by sentence of nullity.

A suit for nullity of marriage may be promoted either where the marriage is void *ab initio*, or where it is merely voidable.

Consanguinity, affinity, force, error, and those bodily imperfections which amount to a total incapacity for consummation, make the marriage voidable only, and not *ipso facto* void, by the Canon Law, until sentence of nullity be actually obtained; and such marriages, except as mentioned below, are valid unless sentence of nullity is actually declared during the lifetime of both parties.

By 5 & 6 Will. 4, c. 54, s. 2, however, it is enacted that all marriages thereafter celebrated between persons within the prohibited degrees of consanguity or affinity shall be *absolutely* null and void, and not voidable only. By the 1st

section it is enacted that all *then-existing* marriages between persons within the prohibited degrees of affinity shall not be annulled for that cause: but this section does not apply to marriage between persons within the prohibited degrees of consanguinity.

Civil disabilities—prior marriage, want of age, (as requiring the consent of parents or guardians): [the latter, however, since the passing of the 4 Geo. 4, c. 76, after marriage had, does not invalidate it, and is therefore no longer a ground of nullity as regards marriages celebrated since that time], idiotcy, or lunacy, consanguinity and affinity in the case of marriages had since 5 & 6 Will. 4, c. 54, and wilful contravention of the provisions of the marriage acts as mentioned below, make the contract void *ab initio*, and not merely voidable. These do not dissolve a contract already made, but they render the parties incapable of contracting at all; they do not put asunder those joined together, but they prohibit the junction; and if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union. (See *Elliott* v. *Gurr*, 2 Phill. 19.)

Cases of nullity are properly described as cases in which the Court gives a reluctant obedience to the provisions of the law. The first inclination of the Court is to support the marriage, as far as it can indulge such an inclination, particularly where the marriage is had on the oath of the party himself who afterwards endeavours to set

it aside; and also particularly where his age is such as not to render his misapprehension probable, *Cresswell* v. *Cosins*, 2 Phill. 283.

In suits of nullity the Court is bound to act with peculiar caution lest the legitimacy of children should be improperly called in question, *Wright* v. *Ellwood*, 2 Hagg. 600.

In all cases of this description, because of the consequences to the parties and the public, the Court will allow of every delay that could be allowed properly, in order to bring the whole circumstances before the Court, *Harford* v. *Morris*, 2 Hagg. C. 423.

Where the Court has to pronounce a declaratory sentence only, and to determine whether the law has made a marriage null and void, lapse of time offers no bar to the inquiry, *Duins* v. *Donovan*, 3 Hagg. 305. But where there has been long cohabitation, that circumstance forms a strong call on the circumspection of the Court to see that the evidence is conclusive; it should be full and complete, *Johnston* v. *Parker*, 3 Phill. 41.

Where a marriage is void *ab initio* there needs no sentence of divorce; it is only declaratory; for, as the marriage is a nullity, it needs not be dissolved; and the parties have been, so far as this marriage is concerned, always sole, *Riddlesden* v. *Wagan*, falsely called *Ingelbert*, Cro. Eliz. 858.

Every person whose interests may be affected by a marriage is entitled to institute a suit to ascertain its validity, *Chichester* v. *Donegal*, 1 Add. 16.

Where a fact of marriage is proved the Court will presume it to be valid until the contrary is shown, *Portsmouth* v. *Portsmouth*, 1 Hagg. 359.

Words in a statute relating to *marriage*, though prohibitory and negative, have never been held to infer a nullity, unless that nullity was declared in the act, and was never so considered by the Legislature, *Catterall* v. *Sweetman*, 1 Robert. 317.

No acquiescence, nor the fact that the parties are desirous of continuing their cohabitation, nor that there are issue, can cure the original defect, *Chichester* v. *Donegal*, 1 Add. 26.

No lapse of time, no laches, no neglect in the proof of a case can make that valid which was originally void; nor can the consent or collusion of parties or the repeated affirmance of a sentence render it valid if proved to be erroneous. (See Poynter's Law of Marriage and Divorce, 2nd edit. 158: Sanchez, lib. 7, Disp, 100). A sentence never passes *in rem judicatam*, whenever there is a *constat* by an evidence of fact touching its iniquity, Ayliffe's Parergon.

Where the Marriage Act makes a marriage void, the sentence of the Court is declaratory only, it does not make it void: If, then, it dismiss the suit, it would not legalize the marriage; but the marriage might be questioned upon any claim of the wife's in any court where such claim was made, *Bowzer* v. *Ricketts*, 1 Hagg. Con. 214. Per Sir W. Scott.

A sentence in the Spiritual Court against a

marriage in a suit of jactitation of marriage (and so also in a suit of nullity of marriage), is not conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in case of bigamy. And, even admitting such sentence as conclusive, the Crown may avoid the same by proof of fraud or collusion. Per all the Judges, *Duchess of Kingston's Case*, 20 How. St. Tr. 444 (note.)

In 1768, the Duchess of Kingston, then Miss Chudleigh, instituted a suit of jactitation of marriage against the Hon. Mr. Hervey, and he was pronounced to have failed in proof of the marriage, *Chudleigh* v. *Hervey*, Cons. Court of London, 1768. On the 8th of March, 1769, Miss Chudleigh married the Duke of Kingston. In April, 1776, she was convicted of bigamy, she being proved to have been previously married to Mr. Hervey, 20 How. St. Tr. 355. On the third of July, an application was made to call upon her to show cause why the sentence of 1768, should not be pronounced null and void. On appeal to the Arches, the marriage to Mr. Hervey was pronounced for, and the previous sentence was nullified, *Bristol* v. *Bristol*, Arches. H. T. 1778. But a sentence so long as it remains undisturbed is conclusive as against the parties to it.

A voidable marriage cannot be rendered void after the death of the parties, *Elliott* v. *Gurr*, 2 Phill. 17.

In a case of doubt a marriage ought never to be declared null and void, *Catterall* v. *Sweetman*, 1 Robt. 320.

There exists a strong distinction in different suits of nullity—nullity by reason of impotency, nullity by reason of statutable enactment, and nullity at common law, where there has been a husband or wife living at the date of the second marriage. Per Dr. Lushington, *Miles* v. *Chilton*, 1 Rob. 698.

The nullity of a marriage may become an incidental question; and when proved by the evidence which establishes the point in issue in the suit, this incidental fact is disposed of by a declaratory sentence, *Blackmore* v. *Brider*, 2 Phill. 359, 1 Hagg. 393.

Where in answer to a suit for a divorce *a mensâ et thoro*, by reason of adultery, the wife pleaded the illegality of the marriage, and also in denial of the adultery, the Court held that the preliminary question of the legality or illegality of the marriage must be decided before the husband was put to the expence of proving the adultery, *Mayhew* v. *Mayhew*, 2 Phill. 12.

Nullity by reason of Consanguinity—Consanguinity in cases of marriage contracted since 5 & 6 Will. 4, c. 54, makes such marriages absolutely void, if between British subjects, *wherever* contracted, *Brook* v. *Brook*, 27 L. J. Ch. 401; before that time they are voidable merely.

registrar shall issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in Schedule (B.) to this Act annexed, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate shall not have been forbidden in the manner provided by either of the said firstly and secondly recited Acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the same notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and at any time within three calendar months next after the day of the entry of such notice the intended marriage may be solemnized under the authority of the said certificate; and every superintendent registrar's certificate for marriage duly issued under the provisions of this Act shall have the same force, validity, and effect as the like certificate issued under the provisions of the said recited Acts or either of them would have had in case this Act had not been passed.

Notice of marriage by licence not to be suspended in the office of the superintendent registrar.

5. In case any party shall intend marriage by licence under the provisions of any of the said recited Acts or of this Act, notice of such intended marriage shall not be suspended in the office of the superintendent registrar, but the party giving the same shall state therein that such marriage is intended to be celebrated by licence.

In case of marriage by licence, notice given to the superintendent registrar of one district shall be sufficient.

6. In any case of marriage intended to be solemnized by licence, under the provisions of either of the said two firstly recited Acts or of this Act, between parties both of whom do not dwell in the same superintendent registrar's district, it shall not be required that notice of such intended marriage shall be given to more than one superintendent registrar, but a notice to the superintendent registrar of the district

in which one of the parties so intending marriage resides shall be sufficient; and it shall not be required that the said notice shall state how long each of the said parties has resided in his or her dwelling place, but only how long the party residing in the district in which the notice is given has so resided.

Notice of marriage without licence may be given in Ireland, if one of the parties reside there.

7. In every case in which one of the parties intending marriage without licence, under the provisions of any of the said recited Acts or of this Act, shall dwell in *Ireland*, the party so dwelling in *Ireland* shall give notice in the form there used in that behalf, or to the like effect to the registrar of the district in *Ireland* within which such party shall have dwelt for not less than seven days then next preceding, and shall state therein the name and surname and the profession and condition and age of each of the parties intending marriage, and also the dwelling place of each of them, and the time, not being less than seven days, during which he or she shall have dwelt therein, and also the church or other building in which the marriage is to be solemnized, provided that if either party shall have dwelt in the place stated in the notice as his or her dwelling place more than one month it may be stated that he or she hath dwelt therein one month and upwards; and such notice shall be dealt with in the manner, and such certificate for marriage shall be given by such registrar in the mode, respectively prescribed in an Act passed in the session holden in the seventh and eighth years of the reign of her present Majesty, chapter eighty-one, intituled *An Act for Marriages in* Ireland, *and for registering such Marriages*, as amended by another Act passed in the session holden in the ninth and tenth years of the same reign, chapter seventy-two, intituled *An Act to amend the Act for Marriages in* Ireland, *and for registering such Marriages*, provided that in such case the certificate for marriage shall not be issued before the expiration of twenty-one days next after the day of the entry of such notice, as in the first of the said two last-mentioned Acts is provided; and from and after the issuing of such certificate the production of the same to any person duly authorized under the provisions of

this Act to solemnize a marriage shall be as valid and effectual for authorizing such person to solemnize such marriage as the production of a certificate for marriage of a superintendent registrar of a district in *England* would be under any or either of the said three firstly hereinbefore recited Acts, if the party giving such notice were resident within such district, and the other party to such intended marriage were also resident within another superintendent registrar's district in *England;* and where marriages have since the passing of the said Act for marriages in *Ireland*, and for registering such marriages, been solemnized in *England* between parties, one of whom was resident in *Ireland*, under certificates, of which one was the certificate of the registrar of the district in *Ireland* within which one of the parties had dwelt for not less than seven days, and the other the certificate of the superintendent registrar of the district in *England* within which the other party had dwelt for not less than seven days, such marriages are hereby declared to be and to have been valid in the same manner as if the parties had been respectively resident for not less than seven days in the respective districts of two superintendent registrars in *England*, and like certificates had been issued by both such superintendent registrars.

Certificate of proclamation of banns in Scotland as to party resident there equivalent to superintendent registrar's certificate.

8. In every case in which one of the parties intending marriage without licence under the provisions of any of the said recited Acts or this Act, shall dwell in *Scotland*, a certificate of proclamation of banns in *Scotland* under the hand of the session clerk of the parish in which such proclamation shall have been made shall, when produced to any person duly authorized under the provisions of this Act to solemnize a marriage, be as valid and effectual for authorizing such person to solemnize such marriage as the production of a certificate for marriage of a superintendent registrar of a district in *England* would be, under any or either of the said three firstly-recited Acts, in reference to a party resident within such district.

In cases of marriage by licence,

9. Every superintendent registrar receiving notice of an intended marriage to be solemnized

by licence as aforesaid shall, after the expiration of one whole day next after the day of the entry of such notice in his "marriage notice book," issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in the said schedule (B.) to this Act annexed, and also a licence to marry, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate shall not have been forbidden in the manner provided by either of the said firstly and secondly recited Acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the same notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and at any time within three calendar months next after the day of the entry of such notice the intended marriage may be solemnized under the authority of the said licence; and every superintendent registrar's certificate and licence for marriage duly issued under the provisions of this Act shall have the same force, validity, and effect as the like certificate and licence issued under the provisions of the said recited Acts or either of them would have had in case this Act had not been passed.

certificate of the notice thereof may be given by the superintendent registrar, (unless the marriage be forbidden) and thereupon the marriage may be solemnized.

10. The form of a licence for marriage so to be granted as aforesaid to any party or parties, by the superintendent registrar of any district as aforesaid, shall be in the form or to the effect of the licence set forth in schedule (C.) to this Act annexed; and for every such licence the superintendent registrar granting the same shall be entitled to have and receive of the party requiring the same the sum of one pound ten shillings, over and above the amount paid for the stamps necessary on granting such licence.

Form of licence for marriage.

11. No such marriage as aforesaid shall be solemnized in any such registered building without the consent of the minister or of one of the

Mode of solemnizing marriages in registered buildings.

trustees, owners, deacons, or managers thereof, nor in any registered building of the Church of *Rome* without the consent of the officiating minister thereof, nor in any church or chapel of the United Church of *England* and *Ireland* without the consent of the minister thereof, nor in such latter case by any other than a duly qualified clergyman of the said united church, or with any other forms or ceremonies than those of the said united church, any Statute or Statutes to the contrary notwithstanding.

Persons desirous may add the religious ceremony ordained by the church.

12. If the parties to any marriage contracted at the registry office of any district conformably to the said recited Acts or any of them, or to the provisions of this Act, shall desire to add the religious ceremony ordained or used by the church or persuasion of which such parties shall be members to the marriage so contracted, it shall be competent for them to present themselves for that purpose to a clergyman or minister of the church or persuasion of which such parties shall be members, having given notice to such clergyman or minister of their intention so to do; and such clergyman or minister, upon the production of their certificate of marriage before the superintendent registrar, and upon the payment of the customary fees (if any), may, if he shall see fit, in the church or chapel whereof he is the regular minister, by himself or by some minister nominated by him, read or celebrate the marriage service of the persuasion to which such minister shall belong: Provided always, that no minister of religion who is not in holy orders of the United Church of *England* and *Ireland* shall under the provisions of this Act officiate in any church or chapel of the United Church of *England* and *Ireland;* but nothing in the reading or celebration of such service shall be held to supersede or invalidate any marriage so previously contracted, nor shall such reading or celebration be entered as a marriage among the marriages in the parish register: Provided also, that at no marriage solemnized at the registry office of any district shall any religious service be used at such registry office.

Superintendent registrar to whom

13. When any marriage is intended to be solemnized between parties not of the Society of

Friends commonly called Quakers, or not professing the Jewish religion, by licence under the provisions of the before-recited Act of the third and fourth years of her Majesty, chapter seventy-two, in a registered building situated in a district within which neither of the parties resides, it shall be lawful for the superintendent registrar to whom notice of such intended marriage shall have been given to grant to the party applying for the same a licence for such marriage to be solemnized in the registered building stated in such notice; and every licence and certificate granted in pursuance of this enactment shall be as valid and effectual to all intents and purposes as if the same had been granted by the superintendent registrar of the district in which the registered building wherein the marriage is intended to be solemnized is situated.

notice is given may grant licence for marriage (under 3 & 4 Vict. c. 72), in a district in which neither of the parties resides.

14. When any marriage is intended to be solemnized, under the provisions of any of the before-recited Acts or of this Act, in the usual place of worship of the parties so intending marriage, or one of them, and such place of worship shall be a registered building situated out of the district of their, his, or her residence, it shall be lawful for the superintendent registrar or respective superintendent registrars to whom notice of such marriage shall have been given to grant to the party applying for the same a licence or certificate, as the case may be, for such marriage to be solemnized in the registered building stated in such notice, provided such building be situated not more than two miles beyond the limits of the district in which the notice of such marriage has been given, and the party giving notice of such marriage shall at the time of giving the same state therein, in addition to the description of the building in which the marriage is to be solemnized, that it is the usual place of worship of one of the parties, and shall also state the name of the party whose usual place of worship it is; and every licence and certificate granted in pursuance of this enactment shall be as valid and effectual, to all intents and purposes, as if the same had been granted by the superintendent registrar of the district in which the registered building wherein

Superintendent registrar may grant licence for marriage to be solemnized in registered building out of district wherein the parties resides.

the marriage is intended to be solemnized is situated.

Registrar general may appoint registrars of marriages; and appointment of registrars of marriages by superintendent registrars to be subject to the approval of the registrar general.

15 The registrar general shall have power and he is hereby authorized from time to time to appoint, by writing under his hand, such person or persons as he may think fit, with such qualifications as the said registrar general by any general rule shall have declared to be necessary, to be a registrar or registrars of marriages within the district of any superintendent registrar; and every appointment to be hereafter made by any superintendent registrar of any person or persons to be a registrar or registrars, for the purpose of being present at marriages to be solemnized under and by virtue of any or by either of the said recited Acts or of this Act, shall be by writing under the hand of such superintendent registrar, and shall be subject to the approval of the registrar general.

Registrar of marriages may appoint a deputy.

16. Every registrar of marriages, already appointed or hereafter to be appointed, shall be and he is hereby empowered, subject to the approval of the registrar general, to appoint, by a writing under his hand, a fit person to be and to act as his deputy, in case of the illness or unavoidable absence of such registrar; and every such deputy, while so acting, shall have all the powers and duties and be subject to all the provisions and penalties in the said recited Acts or any or either of them given, imposed, and contained concerning registrars of marriages; and every such deputy shall hold his office during the pleasure of the registrar by whom he was appointed, but shall be removable by the registrar general; and every registrar of marriages shall be civilly responsible for the acts and omissions of his deputy; and in case any registrar of marriages shall die, or otherwise cease to hold his office, his deputy shall become the registrar of marriages in his place until the appointment of another registrar of marriages shall have been made, and notified to him by the superintendent registrar or by the registrar general, and shall, while continuing such registrar, have the same powers and duties and be subject to the same provisions and penalties as any other registrar of marriages.

Proof of the observance of

17. After any marriage shall have been so-

lemnized, under the authority of any of the said recited Acts or of this Act, it shall not be necessary in support of such marriage to give any proof of the actual dwelling or of the period of dwelling of either of the parties previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnized had been certified according to law as a place of religious worship, or that such building was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage; and all marriages which heretofore have been or which hereafter may be had or solemnized, under the authority of any of the said recited Acts or of this Act, in any building or place of worship which has been registered pursuant to the provisions of the said Act passed in the sixth and seventh years of his late Majesty King *William* the Fourth, chapter eighty-five, but which may not have been certified as required by law, shall be as valid in all respects as if such place of worship had been so certified.

this act and of the recited acts, matters not necessary to the validity of marriages.

18. Any person who shall knowingly or wilfully make any false declaration or sign any false notice required by this Act for the purpose of procuring any marriage, and every person who shall forbid the granting by any superintendent registrar of a certificate for marriage by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury.

Penalty on making false declaration, or giving false notices.

19. If any valid marriage shall be had, under the provisions of any of the said recited Acts or this Act, by means of any wilfully false declaration, notice, or certificate made or obtained by either party to such marriage as to any matter in which a solemn declaration, notice, or certificate is required, it shall be lawful for her Majesty's Attorney General or Solicitor General to sue for a forfeiture of all the estate and interest in any property accruing to the offending party

In case of fraudulent marriages, the guilty party to forfeit all property accruing from the marriage, as in 4 G. 4, c. 76.

by such marriage, and the proceedings thereupon and the consequences thereof shall be the same as are provided in the like case with regard to marriages solemnized by licence between parties under age according to the rites of the Church of *England* in the Statute passed in the fourth year of the reign of his late Majesty King *George* the Fourth, chapter seventy-six.

Nothing to alter, &c. provisions of existing acts, except where at variance with this act.

20. Except where the provisions of the said recited Acts are expressly altered by or are at variance with the provisions of this Act, nothing herein contained shall, alter, repeal, or affect, or be construed so as in any manner to alter, repeal, or affect, any of the several provisions and clauses contained in the same Acts or any of them, but except as aforesaid, the same provisions and clauses respectively shall be and remain in full force and effect as if this Act had not been passed; and this Act shall, except as aforesaid, be considered as incorporated with the same provisions and clauses, and be construed in connexion therewith; provided that, save as herein-after mentioned, none of the provisions of this Act shall limit or alter, or be construed to limit or alter, the privileges of persons belonging to the Society of Friends commonly called Quakers, or of persons professing the Jewish religion, or impose on either of such bodies any obligations beyond such as are enacted in either of the said recited Acts.

Marriages of Quakers or Jews may be solemnized by licence.

21. Any marriage according to the usages of the Society of Friends commonly called Quakers, or to the usages of persons professing the Jewish religion respectively, where the parties thereto are both members of the said society or both persons professing the Jewish religion respectively, may be solemnized by licence (which licence the superintendent registrar to whom notice of the intended marriage shall have been given is hereby authorized to grant, in the form or to the effect set forth in the said Schedule (C.) to this Act annexed,) as effectually in all respects as if such marriage were solemnized after the issue of a certificate by such superintendent registrar in the manner provided by the said recited Acts or any of them; and the provisions in this present Act contained in relation to the solemn declaration to be made by the parties

intending marriage, and to the statement to be contained in the notice of such intended marriage that such marriage is intended to be celebrated by licence, and to the notice to be given of any such intended marriage by licence, and to the giving of certificates in the form or to the effect set forth in Schedule (B.) to this Act annexed, and to the fee and stamp to be paid for such licence, shall be applicable in all respects to every such marriage to be solemnized by licence according to the usages of the said society or to the usages of persons professing the Jewish religion respectively.

Registrar general to furnish marriage register books and forms to each certified secretary of a synagogue of British Jews.

22. The registrar general shall furnish or cause to be furnished to the person whom twenty householders professing the Jewish religion, and being members of the *West London* synagogue of *British* Jews, shall certify in writing under their hands to the registrar general to be the secretary of the *West London* synagogue of *British* Jews, and also to every person whom such secretary shall in like manner certify to be the secretary of some other synagogue of not less than twenty householders professing the Jewish religion, and being in connexion with the *West London* synagogue, and having been established for not less than one year, a sufficient number in duplicate of marriage register books and forms for certified copies thereof; and every secretary of a synagogue to whom such books and forms shall be furnished under this Act shall perform the same duties in relation to the registration of marriages between persons professing the Jewish religion as under an Act passed in the session of Parliament held in the sixth and seventh years of his late Majesty King *William* the Fourth, chapter eighty-six, intituled *An Act for Registering Births, Deaths, and Marriages in* England, are to be performed by the secretary of a synagogue to whom marriage register books and forms for certified copies thereof have been or shall be furnished under that Act.

Marriages under this act good and cognizable.

23. Every marriage solemnized under any of the said recited Acts or of this Act shall be good and cognizable in like manner as marriages before the passing of the first-recited Act according to the rites of the Church of *England*.

Recites the Act

24. And whereas in pursuance of an Act passed

of 15 & 16 Vict. c. 36.

in the session holden in the fifteenth and sixteenth years of her Majesty, chapter thirty-six, intituled *An Act to amend the Law relating to the certifying and registering Places of Religious Worship of Protestant Dissenters*, the registrars of the several dioceses and archdeaconries, and the clerks of the peace of the several counties, ridings, divisions, cities, and boroughs in *England* and *Wales*, did, in the year one thousand eight hundred and fifty-two, make and transmit, as thereby required, to the registrar general of births, deaths, and marriages in *England*, duly verified returns of all places within the limits of their respective jurisdictions which previous to and up to the time of the passing of the last-mentioned Act had been certified according to law and registered or recorded as places of meeting for religious worship: And whereas the total number of such places of meeting so returned to the said registrar general pursuant to the provisions of the said Act is fifty-four thousand eight hundred and four, and it is expedient that, for facilitating the proof of such places having been duly certified and registered or recorded as aforesaid, the registrar general should be empowered by law to allow searches to be made in the said returns, and to give certified copies thereof and extracts therefrom: Be it further enacted as follows:

Registrar general to allow searches to be made, and give extracts from the returns of certified places of worship made to him thereto, on payment of specified fees.

The registrar general, on payment to him of the several fees herein-after mentioned, shall allow searches to be made in the returns so made to him as aforesaid, and shall give to any person demanding the same a certified copy thereof or extract therefrom with respect to any place of meeting for religious worship contained therein; and every such certified copy or extract shall be sealed or stamped with the seal of the General Register Office, and when so sealed or stamped as aforesaid, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the place of meeting therein mentioned or described having been at the time in that behalf therein stated duly certified and registered or recorded as by law required, without any further or other proof of the same; and the registrar general shall be entitled to demand and

receive for every search in the said returns extending over a period of not more than ten years the sum of one shilling, and for every additional period of ten years the sum of sixpence, and the further sum of two shillings and sixpence for every single certified copy or extract.

Act not to extend to Ireland and Scotland.

25. Save as herein expressly provided, this Act shall not extend to *Ireland* or *Scotland*.

Commencement of act.

26. This Act shall come into operation on the first day of *January* one thousand eight hundred and fifty-seven, and none of the provisions thereof shall take effect previous to that day.

SCHEDULES.

SCHEDULE (A.)

Form of Notice of Marriage.

To the superintendent registrar of the district of *Hendon* in the county of *Middlesex*.

I, the undersigned *James Smith*, hereby give you notice, That a marriage is intended to be had *without* [*or*, by, *as the case may be*,] licence within three calendar months from the date hereof between me and the other party herein named and described ; (that is to say) :

Name and Surname.	Condition.	Rank or Profession.	Age	Dwelling Place.	Length of Residence.	Church or Building in which the Marriage is to be solemnized.	District and County in which the Parties respectively dwell.
James Smith	*Widower*	*Ironmonger*	*Twenty-five years*	*16, High Street, Hendon, Middlesex.*	*Seven or Fifteen days, as the case may be. More than a month.*	*Sion Chapel, West Street, Tunbridge, Kent.*	*Hendon, Middlesex.*
Martha Green	*Spinster*		*Nineteen years.*	*Grove Farm, Tunbridge, Kent.*			*Tunbridge, Kent.*

And I hereby solemnly declare, That I believe there is no impediment of kindred or alliance or other lawful hindrance to the said marriage, and that *I*, the above-named *James Smith*, *have* for the space of *fifteen* days immediately preceding the giving of this notice had *my* usual place of abode and residence

[*If the marriage is intended to be had in a church or chapel of the Church of England insert in this space the following words*, "in the parish of " *or* "in the ecclesiastical district of " (*as the case may be*,) *and add the name of the parish or ecclesiastical district in which one of the parties resides*] within the above-mentioned district of *Hendon*.

[And I further declare, That I am not a minor under the age of twenty-one years, and that the other party herein named and described is not a minor under the age of twenty-one years. (*If one or both of the parties be under age these words must be expunged.*)] (*Or, as the case may be,*)

And I further declare, That *she* [*or* I] the said *Martha Green*, not being a *Widow* [*or* Widower], *is* [*or* am] a minor under the age of twenty-one years, and that the consent of *George Kilpin*, whose consent to *her* [*or* my] marriage is required by law, has been duly given and obtained thereto [*or* "that there is no person whose consent to *her* [*or* my] marriage is by law required" (*as the case may be*)].

And I make the foregoing declarations solemnly and deliberately, conscientiously believing the same to be true, pursuant to the provisions of an Act passed in the year of her Majesty Queen Victoria, chapter , intituled "An Act to amend the Provisions of the Marriage and Registration Acts," well knowing that every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice for the purpose of procuring any marriage under the provisions of the said act above mentioned, or any of the several acts therein recited, shall suffer the penalties of perjury. In witness

Date of entry of notice 5*th January*, 1857. *Date of certificate given* 27*th January*, 1857.	The issue of this certificate has not been forbidden by any person authorized to forbid the issue thereof.

Witness my hand, this *twenty-seventh day of January*, 1857.

(Signed) *John Cox*,
Superintendent Registrar.

This certificate will be void unless the marriage is solemnized within three calendar months after the date of the entry of notice, namely, on or *before the fifth day of April*, 1857.

SCHEDULE (C.)

Form of Superintendent Registrar's Licence for Marriage.

To *A.B.* of in the county of and *C.D.* of in the county of I, the undersigned superintendent registrar of the district of in the county of send greeting:

WHEREAS in pursuance of some or one of the Statutes next herein-after mentioned made and now in force concerning the contracting and solemnizing of marriages in England, (that is to say), an Act passed in the seventh year of his late Majesty King William the Fourth, chapter eighty-five; an Act passed in the first year of her present Majesty, chapter 22; an Act passed in the fourth year of her said Majesty, chapter 72; and an Act passed in the year of her said Majesty, chapter ; one of you did on the day of give due Notice of your intention to enter into a contract of marriage, and you are desirous that such marriage should be speedily performed at in the district of : And whereas it has been made to appear to my satisfaction that in regard to your said intended marriage you have severally in all respects complied with the provisions and requirements of the above-mentioned Statutes, so far as such provisions and

requirements are applicable to and binding upon you or either of you: And whereas no impediment of kindred or alliance or other lawful hindrance to the said marriage has been shown to exist: And whereas the certificate required by law has been duly issued by me: Now therefore I, the said Superintendent Registrar, by virtue of the power and authority vested in me in that behalf, do hereby grant unto you the aforesaid A.*B.* and *C.D.* full licence and permission to proceed in due form of law to contract and solemnize such marriage at in the said district at any time within but not after the expiration of three calendar months next following the day of

Witness my hand this day of

E.F.
Superintendent Registrar of the above-mentioned District.

An Act to enable persons to establish Legitimacy and the validity of Marriages, and the right to be deemed natural-born subjects.—*August* 2, 1858.

WHEREAS it is expedient to enable persons to establish their legitimacy, and the marriage of their parents and others from whom they may be descended, and also to enable persons to establish their right to be deemed natural-born subjects: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Application to Court of Divorce and Matrimonial Causes for declaration of legitimacy or validity or invalidity of marriage.

1. Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in *England* or *Ireland*, or claiming any real or personal estate situate in *England*, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to hear and determine such application and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree,

except as hereinafter mentioned, shall be binding to all intents and purposes on her Majesty and on all persons whomsoever.

Application to court for declaration of right to be deemed a natural-born subject.

2. Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said Court for a decree declaratory of his right to be deemed a natural-born subject of her Majesty, and the said Court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just, and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the said Court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon her Majesty and all persons whomsoever.

Petition to be accompanied by affidavit.

3. Every petition under this Act shall be accompanied by such affidavit verifying the same, and of the absence of collusion, as the Court may by any general rule direct.

20 & 21 Vict. c. 85, to apply to proceedings under this Act.

4. All the provisions of the Act of the last session, chapter eighty-five, so far as the same may be applicable, and the powers and provisions therein contained in relation to the making and laying before Parliament of rules and regulations concerning the practice and procedure under that Act, and fixing the fees payable upon proceedings before the Court, shall extend to applications and proceedings in the said Court under this Act, as if the same had been authorized by the said Act of the last session.

Power to award and enforce payment of costs.

5. In all proceedings under this Act the Court shall have full power to award and enforce payment of costs to any persons cited, whether such persons shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that such costs shall be paid.

Attorney general to have a copy of petition one month before it is filed, and to be respondent.

6. A copy of every petition under this Act, and of the affidavit accompanying the same, shall, one month at least previously to the presentation or filing of such petition, be delivered to her Majesty's Attorney General, who shall be a respondent upon the hearing of such

petition and upon every subsequent proceeding relating thereto.

Court may require persons to be cited.

7. Where any application is made under this Act to the said Court such person or persons (if any) besides the said Attorney General as the Court shall think fit, shall, subject to the rules made under this Act, be cited to see proceedings or otherwise summoned in such manner as the Court shall direct, and may be permitted to become parties to the proceedings, and oppose the application.

Saving for rights of persons not cited.

8. The decree of the said Court shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings or is the heir-at-law or next of kin, or other real or personal representative of or derives title under or through a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person if subsequently proved to have been obtained by fraud or collusion.

Persons domiciled in Scotland may insist, on an action of declarator, that he is a natural-born subject.

9. Any person domiciled in *Scotland*, or claiming any heritable or moveable property situate in *Scotland*, may raise and insist, in an action of declarator before the Court of Session, for the purpose of having it found and declared that he is entitled to be deemed a natural-born subject of her Majesty; and the said Court shall have jurisdiction to hear and determine such action of declarator, in the same manner and to the same effect, and with the same power to award expenses, as they have in declarators of legitimacy and declarators of bastardy.

No proceedings to affect final judgments, &c. already pronounced.

10. No proceeding to be had under this Act shall affect any final judgment or decree already pronounced or made by any Court of competent jurisdiction.

Acts to be read together.

Short title.

11. The said Act of the last session and this Act shall be construed together as one Act; and this Act may be cited for all purposes as "The Legitimacy Declaration Act, 1858."

An Act to amend the Law relating to Divorce and Matrimonial Causes in England.—28*th August*, 1857.

WHEREAS it is expedient to amend the law relating to divorce, and to constitute a court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage: be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Commencement of Act.

1. This act shall come into operation on such day, not sooner than the first day of January, one thousand eight hundred and fifty-eight, as her Majesty shall by Order in Council appoint, provided that such order be made one month at least previously to the day so to be appointed.

Jurisdiction in matters matrimonial now vested in Ecclesiastical Courts to cease.

2. As soon as this Act shall come into operation, all jurisdiction now exerciseable by any Ecclesiastical Court in England in respect of Divorces *á mensâ et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, shall cease to be so exercisable, except so far as relates to the granting of marriage licenses, which may be granted as if this Act had not been passed.

The Court may enforce decrees or orders made before this Act comes into operation.

3. Any decree or order of any Ecclesiastical Court of competent jurisdiction which shall have been made before this Act comes into operation, in any cause or matter matrimonial, may be enforced or otherwise dealt with by the Court for Divorce and Matrimonial Causes herein-after mentioned, in the same way as if it had been originally made by the said court under this Act.

As to suits

4. All suits and proceedings in causes and

pending when this Act comes into operation.

matters matrimonial which at the time when this Act comes into operation shall be pending in any ecclesiastical court in England, shall be transferred to, dealt with, and decided by the said Court for Divorce and Matrimonial Causes, as if the same had been originally instituted in the said court.

Power to judges whose jurisdiction is determined to deliver written judgments.

5. Provided, that if at the time when this Act comes into operation, any cause or matter which would be transferred to the said Court for Divorce and Matrimonial Causes under the enactment hereinbefore contained shall have been heard before any judge having jurisdiction in relation to such cause or matter, and be then standing for judgment, such judge may at any time within six weeks after the time when this Act comes into operation give in to one of the registrars attending the Court for Divorce and Matrimonial Causes a written judgment thereon signed by him; and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment, and every such decree or order shall have the same force and effect as if it had been drawn up in pursuance of a judgment of the Court for Divorce and Matrimonial Causes on the day on which the same was delivered to the registrar, and shall be subject to appeal under this Act.

Jurisdiction over causes matrimonial to be exercised by the Court for Divorce and Matrimonial Causes.

6. As soon as this Act shall come into operation, all jurisdiction now vested in or exercisable by any Ecclesiastical Court or person in England in respect of divorces *á mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licenses, shall belong to and be vested in her Majesty, and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of her Majesty in a Court of Record to be called "The Court for Divorce and Matrimonial Causes."

No decree for divorce *à mensâ et thoro* to be made hereafter, but a judicial separation.

7. No decree shall hereafter be made for a divorce *à mensâ et thoro;* but in all cases in which a decree for a divorce *à mensâ et thoro* might now be pronounced, the Court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce *à mensâ et thoro* now has.

Judges of the Court.

8. The Lord Chancellor, the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, the senior Puisne Judge for the time being in each of the three last-mentioned Courts, and the Judge of Her Majesty's Court of Probate constituted by any act of the present session, shall be the judges of the said court.

Judge of the Court of Probate to be the Judge Ordinary, and shall have full authority, &c.

9. The Judge of the Court of Probate shall be called the Judge Ordinary of the said court, and shall have full authority, either alone or with one or more of the other judges of the said court, to hear and determine all matters arising therein, except petitions for the dissolving of or annulling marriage, and applications for new trials of questions or issues before a jury, bills of exception, special verdicts, and special cases, and except as aforesaid, may exercise all the powers and authority of the said court.

Petitions for dissolution of a marriage, &c. to be heard by three judges.

10. All petitions, either for the dissolution or for a sentence of nullity of marriage, and applications for new trials of questions or issues before a jury, shall be heard and determined by three or more judges of the said court, of whom the judge of the Court of Probate shall be one.

Who to act as judge during absence of the Judge Ordinary.

11. During the temporary absence of the Judge ordinary, the Lord Chancellor may, by writing under his hand, authorize the Master of the Rolls, the Judge of the Admiralty Court, or either of the Lords Justices, or any Vice-Chancellor, or any Judge of the Superior Courts of Law at Westminster, to act as Judge Ordinary of the said Court for Divorce and Matrimonial Causes, and the Master of the Rolls, the Judge of the Admiralty Court, Lord Justice, Vice-Chancellor, or Judge of the Superior Courts, shall, when so acting, have and exercise all the jurisdiction, power, and authority which might have been exercised by the Judge Ordinary.

Sittings of the court.

12. The Court for Divorce and Matrimonial Causes shall hold its sittings at such place or places in London or Middlesex or elsewhere as her Majesty in Council shall from time to time appoint.

Seal of the court.

13. The Lord Chancellor shall direct a seal to be made for the said court, and may direct the same to be broken, altered, and renewed, at his

discretion ; and all decrees and orders, or copies of decrees or orders, of the said court, sealed with the said seal, shall be received in evidence.

Officers of the court.

14. The registrars and other officers of the principal registry of the Court of Probate shall attend the sittings of the Court for Divorce and Matrimonial Causes, and assist in the proceedings thereof, as shall be directed by the rules and orders under this act.

Power to advocates, barristers, &c. of Ecclesiastical and Superior Courts to practise in the court.

15. All persons admitted to practise as advocates or proctors respectively in any Ecclesiastical Court in England, and all barristers, attorneys, and solicitors, entitled to practise in the Superior Courts at Westminster, shall be entitled to practise in the Court of Divorce and Matrimonial Causes ; and such advocates and barristers shall have the same relative rank and precedence which they now have in the Judicial Committee of the Privy Council, unless and until Her Majesty shall otherwise order.

Sentence of judicial separation may be obtained by husband or wife for adultery, &c.

16. A sentence of judicial separation (which shall have the effect of a divorce *à mensâ et thoro* under the existing law, and such other legal effect as herein mentioned) may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards.

Application for restitution of conjugal rights or judicial separation may be made by husband or wife by petition to court, &c.

17. Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife, by petition to the Court, or to any Judge of Assize at the Assizes held for the county in which the husband and wife reside or last resided together, and which Judge of Assize is hereby authorised and required to hear and determine such petition, according to the rules and regulations which shall be made under the authority of this Act ; and the court or judge to which such petition is addressed, on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly, and where the application is by the wife may make any order for alimony which shall be deemed just : Provided always, that any Judge of Assize to whom such petition

shall be presented may refer the same to any of her Majesty's counsel or serjeant-at-law named in the Commission of Assize or Nisi Prius, and such counsel or serjeant shall, for the purpose of deciding upon the matter of such petition, have all the powers that any such judge would have had by virtue of this Act or otherwise.

Powers of Judges of Assize for purposes of deciding applications under the authority of this Act.

18. For the purpose of hearing and deciding all applications under the authority of this Act, the Judge of Assize, or person nominated by him as aforesaid, shall be entitled to avail himself of the services of all officers, and use and exercise all powers and authorities which the Court of Assize may employ, use, and exercise for the determination of causes and other matters now usually heard and decided by them respectively, and the said Judge of Assize or other person shall also for the purpose have and be entitled to exercise all the powers and authorities hereby given to the court for the hearing and deciding applications made to it, and also the powers hereby given to the court to make provision touching the custody, maintenance, and education of children; and every order made by any Judge of Assize or other person under the authority of this Act, may, on the application of the person obtaining the same, be entered as an order of the court, and when so entered shall have the same force and effect, and be enforced in the same manner, as if such order had been originally made by the court.

The court to regulate fees on proceedings before judges, &c.

19. The court shall from time to time fix and regulate the fees which shall be payable upon all proceedings under any application to a Judge of Assize under this Act; and such fees shall be received in money, for their own benefit, by the persons to whom or for whose use the same shall be directed to be paid.

Orders may be reviewed.

20. Any order so entered as aforesaid may be reviewed, and either altered or reversed on appeal to the Judge Ordinary of the court, but such appeal shall not stay the intermediate execution of the order, unless the Judge Ordinary shall so direct, who shall have power, if such appeal be dismissed or abandoned, to order the appellant to pay to the other party the full costs incurred by reason of such appeal.

Wife deserted by

21. A wife deserted by her husband may at

her husband may apply to a police magistrate or justices in petty sessions for protection.

any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrates or justices for court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole:* Provided always, that every such order, if made by a police magistrate, or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the county court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the court, or to the magistrate or justices by whom such order was made, for the discharge thereof: Provided also, that if the husband or any creditor of or other person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

Court to act on principles of the Ecclesiastical Courts.

22. In in all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on

principles and rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act.

Decree of separation obtained during the absence of husband or wife may be reversed.

23. Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the court praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.

Court may direct payment of alimony to wife or to her trustee.

24. In all cases in which the court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which to the court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the court expedient so to do.

In case of judicial separation the wife to be considered a *feme sole* with respect to propery she may acquire, &c.

25. In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; Provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her

separate use, subject however to any agreement in writing made between herself and her husband whilst separate.

also, for purposes of contract and and suing.

26. In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: Provided also, that nothing shall prevent the wife from joining, or at any time during such separation, in the exercise of any joint power given to herself and her husband.

On adultery of wife or incest, &c., of husband, petition for dissolution of marriage may be presented.

27. It shall be lawful for any husband to present a petition to the said court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *à mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards; and every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded: Provided that for the purposes of this Act, incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguity or affinity: and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of

As to "incestuous adultery."

the former husband or wife, whether the second marriage shall have taken place within the dominions of her Majesty or elsewhere.

Adulterer to be a co-respondent.

28. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties, or either of them, may insist on having the contested matters of fact tried by a jury, as hereinafter mentioned.

cause may be tried by a jury.

Court to be satisfied of absence of collusion

29. Upon any such petition for the dissolution of a marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner.

Dismissal of petition.

30. In case the court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the court shall dismiss the said petition.

Power to court to pronounce decree for dissolving marriage.

31. In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner had been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall pronounce a decree declaring such marriage to be dissolved: Provided always, that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or

if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

Alimony.

32. The court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction to the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage the Court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation.

Husband may claim damages from adulterer.

33. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of Common Law; and all the enactments herein contained with reference to the hearing and decision of petitions to the court shall, so far as may be necessary, be deemed applicable to the hearing and decision of peti-

tions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been given the court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

Power to court to order adulterer to pay costs.

34. Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings.

Power to court to make orders as to custody of children.

35. In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.

Questions of fact may be tried before the court.

36. In questions of fact arising in proceedings under this Act it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the said Court, by the verdict of a special or common jury.

Where a question is ordered to be tried a jury may be summoned as in the Common Law Courts.

37. The court, or any judge thereof, may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special or common jury for the trial of such question as may now be made by any of the Superior Courts of Common Law at Westminster, and may also make any other orders which to such court or judge may seem requisite; and every such jury shall consist of persons possessing the like qualifications, and shall be struck, sum-

moned, ballotted for, and called in like manner as if such jury were a jury for the trial of any cause in any of the said Superior Courts; and every juryman so summoned shall be entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of the said Superior Courts; and every party to any such proceeding shall be entitled to the same rights as to challenge and otherwise as if he were a party to any such cause.

Rights to challenge.

Such question to be reduced into writing, and a jury to be sworn to try it.

38. When any such question shall be so ordered to be tried, such question shall be reduced into writing in such form as the court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the court or judge shall have the same powers, jurisdiction, and authority as any judge of any of the said Superior Courts sitting at Nisi Prius.

Judge to have same powers as at Nisi Prius.

Bill of exceptions, special verdict, and special case.

39. Upon the trial of any such question or of any issue under this Act a bill of exceptions may be tendered, and a general or special verdict or verdicts, subject to a special case, may be returned, in like manner as in any cause tried in any of the said Superior Courts; and every such bill of exceptions, special verdict, and special case respectively shall be stated, settled, and sealed in like manner as in any cause tried in any of the said Superior Courts, and where the trial shall not have been had in the Court for Divorce and Matrimonial Causes shall be returned into such court without any writ of error or other writ; and the matter of law in every such bill of exceptions, special verdict, and special case shall be heard and determined by the full courts, subject to such right of appeal as is hereinafter given in other cases.

Court may direct issues to try any fact.

40. It shall be lawful for the court to direct one or more issue or issues to be tried in any Court of Common Law, and either before a judge of assize in any county or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery.

Affidavit in support of a petition.

41. Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or

a dissolution of marriage, or decree in a suit of jactitation of marriage, shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent, and the other party to the marriage.

Service of Petition.

42. Every such petition shall be served on the party to be affected thereby, either within or without her Majesty's dominions, in such manner as the court shall by any general or special order from time to time direct, and for that purpose the court shall have all the powers conferred by any statute on the Court of Chancery: Provided always, that the said court may dispense with such service altogether in case it shall seem necessary or expedient so to do.

Examination of petitioner.

43. The court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition, but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery.

Adjournment.

44. The court may from time to time adjourn the hearing of any such petition, and may require further evidence thereon, if it shall see fit so to do.

Court may order settlement of property for benefit of innocent party, and children of marriage.

45. In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.

Mode of taking evidence.

46. Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the court where their attendance can be had shall be sworn and examined orally in open court: Provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the

deponent in every such affidavit shall, on the application of the opposite party or by direction of the court, be subject to be cross-examined by or on behalf of the opposite party orally in open court, and after such cross-examination may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed.

Court may issue commissions or give orders for examination of witnesses abroad or unable to attend.

47. Provided, that where a witness is out of the jurisdiction of the court, or where by reason of his illness or from other circumstances, the court shall not think fit to enforce the attendance of the witness in open court, it shall be lawful for the court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise; or if the witness be within the jurisdiction of the court, to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said court, or other person to be named in such order for the purpose; and all the powers given to the Courts of Law at Westminster by the Acts of the thirteenth year of King George the Third, chapter sixty-three, and of the first year of King William the Fourth, chapter twenty-two, for enabling the Courts of Law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such courts, and to enforce such examination, and all the provisions of the said Acts, and of any other Acts for enforcing or otherwise applicable to such examination and the witnesses examined, shall extend and be applicable to the court and to the examination of witnesses under the commissions and orders of the said court, and to the witnesses examined, as if such court were one of the Courts of Law at Westminster, and the matter before it were an action pending in such court.

Rules of evidence in Common Law Courts to be observed.

48. The rules of evidence observed in the Superior Courts of Common Law at Westminster shall be applicable to and observed in the trial of all questions of fact in the court.

Attendance of witnesses on the Court.

49. The court may, under its seal, issue writs of *subpœna* or *subpœna duces tecum*, commanding the attendance of witnesses at such time and place as shall be therein expressed; and such writs may be served in any part of Great Britain

or Ireland; and every person served with such writ shall be bound to attend and to be sworn and give evidence in obedience thereto, in the same manner as if it had been a writ of *subpœna* or *subpœna duces tecum* issued from any of the said Superior Courts of Common Law in a cause pending therein, and served in Great Britain or Ireland, as the case may be: Provided that any petitioner required to be examined, or any person called as a witness or required or desiring to make an affidavit or deposition under or for the purposes of this Act, shall be permitted to make his solemn affirmation or declaration instead of being sworn in the circumstances and manner in which a person called as a witness or desiring to make an affidavit or deposition would be permitted so to do under the "Common Law Procedure Act, 1854," in cases within the provisions of that Act.

Penalties for false evidence.

50. All persons wilfully deposing or affirming falsely in any proceeding before the court shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attached thereto.

Costs.

51. The court on the hearing of any suit, proceeding, or petition under this Act, and the House of Lords on the hearing of any appeal under this Act, may make such order as to costs as to such Court or House respectively may seem just: Provided always, that there shall be no appeal on the subject of costs only.

Enforcement of orders and decrees.

52. All decrees and orders to be made by the court in any suit, preceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution.

Power to make rules, &c., for procedure, and to alter them from time to time.

53. The court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same.

Fees to be regulated.

54. The court shall have full power to fix and regulate from time to time the fees payable upon all proceedings before it, all which fees shall be received, paid, and applied as herein directed: Provided always, that the said court may make

such rules and regulations as it may deem necessary and expedient for enabling persons to sue in the said court *in forma pauperis*.

Appeal from the Judge Ordinary to the full court.

55. Either party dissatisfied with any decision of the court in any matter which, according to the provisions aforesaid, may be made by the Judge Ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the full court, whose decision shall be final.

Appeal to the House of Lords in case of petition for dissolution of marriage.

56. Either party dissatisfied with the decision of the full court on any petition for the dissolution of a marriage may, within three months after the pronouncing thereof, appeal therefrom to the House of Lords if Parliament be then sitting, or if Parliament be not sitting at the end of such three months, then within fourteen days next after its meeting; and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree, or remit the case to the court, to be dealt with in all respects as the House of Lords shall direct.

Liberty to parties to marry again.

57. When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: Provided always, that no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person.

No clergyman compelled to solemnize certain marriages.

If minister of any Church, &c. refuses to perform marriage ceremony, any other minister may perform such service.

58. Provided always, That when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said United Church, entitled to officiate within the diocese in which such church or chapel is situate, to

perform such marriage service in such church or chapel.

59. After this Act shall have come into operation no action shall be maintainable in England for criminal conversation. No action in England for criminal conversation.

60. None of the fees payable under this Act, except as herein expressly provided, shall be received in money, but every such fee shall be collected and received by a stamp denoting the amount of the fee which would otherwise be payable; and the fees to be so collected by stamps shall be "stamp duties," and be under the management of the commissioners of inland revenue. All fees, except as hereinbefore provided, to be collected by stamps.

61. The provisions contained in or referred to by an Act of the present session of Parliament, "to amend the laws relating to probates and letters of administration in England," and applicable to the collection and payment and accounts of the fees to be received thereunder by means of stamps, and to such stamps, and the vellum, parchment, or paper on or to which the same shall be impressed or affixed, and in relation to documents which ought to have stamps impressed thereon or affixed thereto, and to the punishment of persons for such wrongful acts as therein mentioned in relation to stamps, or fees or sums of money which ought to be collected by means of stamps, shall be applicable to and for the purposes of this Act, as if such provisions as aforesaid had been contained or referred to in this Act with reference to the like matters, and the court under this Act had been mentioned, instead of the Court of Probate, or the judge thereof as the case may be. Provisions concerning stamps for the Court of Probate to be applicable to the purposes of this Act.

62. It shall be lawful for the Commissioners of her Majesty's Treasury, out of such moneys as may be provided and appropriated by Parliament for the purpose, to cause to be paid all necessary expenses of the court under this Act, and other expenses which may be incurred in carrying the provisions of this Act into effect, except as herein otherwise provided. Expenses of the court to be paid out of moneys to be provided by Parliament.

63. The same amount of stamp duty as is now payable on the admission of a proctor to any Ecclesiastical Court shall be payable by every person to be admitted as a proctor in the Court of Divorce and Matrimonial Causes, or in the Court of Probate, who shall not have been pre- Stamp duty on admission of proctors, and annual certificates.

viously admitted as a proctor in the other of such Courts, or in an Ecclesiastical or Admiralty Court, and have paid the stamp duty in respect thereof; and every person who shall practise as a proctor or as a solicitor or attorney in the said Court of Divorce and Matrimonial Causes, or the said Court of Probate, shall obtain an annual certificate to authorize him so to do, under the Stamp Duty Acts, in the same manner as proctors practising in the Ecclesiastical or Admiralty Courts, and solicitors and attorneys practising in her Majesty's Courts at Westminster, are now required to do by the said Acts or any of them, and shall be subject and liable to the same penalties and disabilities in case of any neglect to obtain such certificates as such proctors, attorneys, and solicitors are now subject and liable to for any similar neglect, and as if the clauses and provisions of the said Acts in relation to such certificates had been inserted in this Act, and specially enacted in reference to proctors, solicitors, and attorneys practising in the said Court of Divorce and Matrimonial Causes and Court of Probate, provided that one annual certificate only shall be required for any one person, although he may practise in more than one of the capacities aforesaid, or in several of the courts hereinbefore mentioned.

Compensation to proctors.

64. Every person who at the time of the passing of this Act has been duly admitted and is practising as a proctor in any Ecclesiastical Court in England shall, at the expiration of two years from and after the commencement of this Act, be entitled to make a claim for compensation to the Commissioners of her Majesty's Treasury; and the said commissioners, by examination of evidence on oath (which they are hereby empowered to administer), or otherwise, as they shall think fit, shall enquire into and ascertain the loss, if any, of professional gains and profits in respect of suits relating to marriage and divorce sustained by such proctors respectively, upon a comparison in each case of the average clear gains of the three years immediately before the commencement of this Act, arising from such last-mentioned business, and the average of the same gains during the two years immediately succeeding the commencement

of this Act; and the said commissioners shall in each case, having regard to all the circumstances, award a reasonable compensation, by way of annuity, to the persons sustaining such loss, during their lives, but in no case shall such annuity exceed one half of the annual loss so ascertained as aforesaid; and such annuities shall be paid out of moneys to be annually provided by Parliament for that purpose, and the persons receiving the same shall be subject to the provisions contained in the nineteenth section of the Act of fourth and fifth William the Fourth, chapter twenty-four.

As to salary of judge of Court of Probate, if appointed judge of Court of Divorce, &c.

65. In case the Judge of the Court of Probate established by any Act passed during the present session shall be appointed Judge Ordinary of the Court for Divorce and Matrimonial Causes, the salary of such judge shall be the sum of five thousand pounds per annum; but such judge, if afterwards appointed Judge of the Admiralty Court, shall not be entitled to any increase of salary.

Power to Secretary of State to order all letters patent, records, &c., to be transmitted from all Ecclesiastical Courts.

66. Any one of Her Majesty's principal secretaries of State may order every judge, registrar, or other officer of any Ecclesiastical Court in England or the Isle of Man, or any other person having the public custody of or control over any letters patent, records, deeds, processes, acts, proceedings, books, documents, or other instrument relating to marriages, or to suits for divorce, nullity of marriage, restitution of conjugal rights, or to any other matters or causes matrimonial, except marriage licenses, to transmit the same, at such times and in such manner, to such places in London or Westminster, and under such regulations as the said Secretary of State may appoint; and if any judge, registrar, officer, or other person shall wilfully disobey such order he shall for the first offence forfeit the sum of one hundred pounds, to be recoverable by any registrar of the Court of Probate as a debt under his Act in any of the Superior Courts at Westminster, and for the second and subsequent offences the Judge Ordinary may commit the person so offending to prison for any period not exceeding three calendar months, provided that the warrant of committal be countersigned by one of her Majesty's principal Secretaries of

Penalty on disobeying such order.

or variation of such order or decree, or the cessation or discontinuance of such separation.

Where alleged adulterer a co-respondent Court may order him to be dismissed from the suit.

11. In all cases now pending, or hereafter to be commenced, in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her.

Persons who administer oaths under 20 & 21 Vict. c. 77. to administer under 20 & 21 Vict. c. 85.

12. Registrars, surrogates, commissioners for taking oaths in the Court of Chancery, and all other persons now or hereafter authorized to administer oaths under the Act of the twentieth and twenty-first *Victoria*, chapter seventy-seven, or under this Act, shall have power to administer oaths under the Act of the twentieth and twenty-first *Victoria*, chapter eighty-five.

Bills of proctors, attornies, &c. to be subject to taxation.

13. The bill of any proctor, attorney, or solicitor, for any fees, charges, or disbursements in respect of any business transacted in the Court for Divorce and Matrimonial Causes, and whether the same was transacted before the full court or before the Judge Ordinary, shall, as well between proctor, or attorney, or solicitor, and client, as between party and party, be subject to taxation by any one of the registrars belonging to the principal registry of the Court of Probate, and the mode in which any such bill shall be referred for taxation, and by whom the costs of the taxation shall be paid, shall be regulated by the rules and orders to be made under the Act of the twentieth and twenty-first of *Victoria*, chapter eighty-five, and the certificate of the registrar of the amount at which such bill is taxed shall be subject to appeal to the judge of the said court.

Power to enforce decree as to costs.

14. The Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the registrars of the principal registry of the Court of Probate, shall respectively, in any case where an ecclesiastical court having matrimonial jurisdiction had, previously to the commencement of the Act of the twentieth and twenty-first *Victoria*, chapter eighty-five, made any order or decree in respect

of costs, have the same power of taxing such costs, and enforcing payment thereof, or of otherwise carrying such order or decree into effect, as if the cause wherein such decree was made had been originally commenced and prosecuted in the said Court for Divorce and Matrimonial Causes: Provided, that in taxing any such costs, or any other costs incurred in causes depending in any ecclesiastical court previously to the commencement of the said recited Act, all fees, charges, and expenses shall be allowed which might have been legally made, charged, and enforced according to the practice of the Court of Arches.

Judge to exercise power and authority over proctors, &c.

15. The Judge Ordinary of the Court for Divorce and Matrimonial Causes shall have and exercise, over proctors, solicitors, and attornies practising in the said court, the like authority and control as is now exercised by the judges of any court of equity or of common law over persons practising therein as proctors, solicitors, or attornies.

Commissioners may be appointed in the Isle of Man, &c.

16. It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes to appoint, by commission under seal of the court, any persons practising as solicitors in the *Isle of Man*, in the *Channel Islands*, or any of them, to administer oaths, and to take declarations or affirmations, to be used in the said court; and such persons shall be entitled from time to time to charge and take such fees as any other persons performing the same duties in the Court for Divorce and Matrimonial Causes may charge and take.

Appeal in cases of nullity of marriage to lie to the House of Lords.

17. Whereas doubts may be entertained whether the right of appeal given by the Act of the twentieth and twenty-first *Victoria*, chapter eighty-five, section fifty-six, extends to sentences on petitions for nullity of marriage: be it enacted and declared, that either party dissatisfied with any such sentence may appeal therefrom in the same manner, within the same time, and subject to the same regulations as affect appeals against sentences on petitions for the dissolution of marriage.

Judge ordinary may grant rule nisi for new trial, &c.

18. Where any trial shall have been had by a jury before the full court or before the Judge Ordinary, or upon any issue directed by the full court or by the Judge Ordinary, it shall be

lawful for the Judge Ordinary, subject to any rules to be hereafter made, to grant a rule nisi for a new trial, but no such rule shall be made absolute except by the full court.

So much of 20 & 21 Vict. c. 85, as to applications to judges of assize repealed.

19. So much of the Act of the twentieth and twenty-first *Victoria*, chapter eighty-five, as authorizes application to be made for restitution of conjugal rights or for judicial separation by petition to any judge of assize, and as relates to the proceedings on such petition, shall be and the same is hereby repealed.

Affidavits, before whom to be sworn when parties making them reside in foreign parts.

20. In cases where it is necessary to obtain affidavits, declarations, or affirmations to be used in the Court for Divorce and Matrimonial Causes from persons residing in foreign parts out of her Majesty's dominions, the same may be sworn, declared, or affirmed before the persons empowered to administer oaths under the Act of the sixth of *George* the fourth, chapter eighty-seven, or under the Act of the eighteenth and nineteenth of *Victoria*, chapter forty-two; provided that in places where there are no such persons as are mentioned in the said Acts, such affidavits, declarations, or affirmations may be made, declared, and affirmed before any foreign local magistrate or other person having authority to administer an oath there.

Affidavits, before whom to be sworn.

21. Affidavits, declarations, and affirmations to be used in the Court for Divorce and Matrimonial Causes may be sworn and taken in *Scotland*, *Ireland*, the *Isle of Man*, the *Channel Islands*, or any colony, island, plantation, or place out of *England* under the dominion of her Majesty, before any court, judge, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or, so far as relates to the *Isle of Man* and the *Channel Islands*, before any commissary, ecclesiastical judge, or surrogate who at the time of the passing of the Act of last session, chapter seventy-seven, was authorized to administer oaths in the *Isle of Man* or in the *Channel Islands* respectively; and all registrars and other officers of the Court for Divorce and Matrimonial Causes shall take judicial notice of the seal or signature, as the case may be, of any such judge, notary public, or person, which shall be attached, suspended, or subscribed to any

such affidavit, declaration, or affirmation, or to any other document.

Persons forging seal or signature guilty of felony.

22. If any person shall forge any such seal or signature as last aforesaid, or any seal or signature impressed, affixed, or subscribed under the provisions of the said Act of the Sixth of *George* the Fourth, or of the said Act of the eighteenth and nineteenth of *Victoria*, to any affidavit, declaration, or affirmation to be used in the Court for Divorce and Matrimonial Causes, or shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of his life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years nor less than one year; and whenever any such document has been admitted in evidence by virtue of this Act, the court or the person who has admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, for such period and subject to such conditions as to the said court or person shall seem meet: and every person charged with committing any felony under this Act may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he may be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried.

Persons taking a false oath before a surrogate guilty of perjury.

23. Any person who shall wilfully give false evidence, or who shall wilfully swear, affirm, or declare falsely, in any affidavit or deposition made under the authority of this Act before any surrogate having authority to administer oaths under the Act of the twentieth and twenty-first *Victoria*, chapter seventy-seven, or before any

28. After the answer of the husband has been filed, the wife may, at its next sitting, move the court to decree her alimony *pendite lite*; provided that the wife shall, two days at least before she so moves the court, give notice to her husband, or to his proctor, solicitor, or attorney, of her intention so to do.

29. A wife who has obtained a decree of judicial separation in her favour, and has previously filed her petition for alimony, may, unless in cases where an appeal to the full court is interposed, move the court to decree her permanent alimony; provided that she shall, eight days at least before making any such motion, give notice to the husband, or to his proctor, solicitor, or attorney, of her intention so to do.

30. Where a decree of judicial separation has been pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again.

31. Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and there deposit the præcipe.—Forms of subpœna are given, Nos 6 and 8; and forms of præcipe, Nos. 7 and 9.

32. The petitioner or respondent may call upon the other party, by notice in writing, to admit any document, saving any just exceptions; and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the Judge Ordinary shall certify that the refusal to admit was reasonable; and when such notice to admit has not been given, no costs of proving any document shall be given, except in cases where the omission to give the notice is in the opinion of the registrar a saving of expense.

33. The hearing of the cause shall be conducted in Court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the Courts of Common Law.

34. The Registrar shall, in cases tried by a jury, enter on the record the finding of the jury and the decree of the Court, and shall sign the same. In all cases the Registrar shall enter the decree of the Court in the Court Book.

35. In cases to be tried upon affidavit the petitioner and respondent shall file their affidavits within eight days from the filing of the last proceeding.

36. Counter-affidavits to any facts stated in any such affi-

davits may be filed by either party within fifteen days from the filing of the affidavit which they are intended to answer.

37. Affidavits in reply to counter affidavits may be filed by permission of the Judge Ordinary granted on motion or summons, but not otherwise.

38. Applications to produce a deponent in the cause, for the purpose of cross-examination, shall be made on summons to the Judge Ordinary sitting in chambers.

39. Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made on summons to the Judge Ordinary in chambers, and supported by affidavit.—A form of application is given, No. 13.

40. Applications for the discharge of any order made to protect the earnings and property of the wife are to be founded on affidavit.

41. Petitions to the Court for the reversal of a decree of judicial separation must set out the grounds upon which the petitioner relies, as in form No. 14.

42. Any person desirous of prosecuting a suit *in formâ pauperis* shall lay a case before counsel, and obtain an opinion from such counsel that he or she has reasonable grounds for applying to the Court for relief.

43. No person shall be admitted to prosecute a suit *in formâ pauperis* without the order of the Judge Ordinary; and to obtain such order the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or of his or her attorney that the same case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth £25, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

44. Where a pauper omits to proceed to trial pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid.

45. Every application for a new trial in respect of causes tried before a jury is to be lodged in the Registry within a month from the day on which the cause was tried.

46. If the petitioner or respondent, unless by leave of the Judge Ordinary previously obtained, fail to deliver the answer, reply, or other proceeding within the time specified in these rules, the other party shall not be compelled to receive the same, unless by direction of the

Judge Ordinary. The expense of every such application to the Judge Ordinary shall fall on the party causing the delay, unless the Judge Ordinary shall otherwise direct.

47. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge Ordinary.

48. Wherever it becomes necessary to give a notice to the opposite party in the cause, such notice shall be in writing, signed by the party, or by his or her proctor, solicitor, or attorney.

49. The addition and true place of abode of every person making an affidavit is to be inserted therein.

50. In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

51. No affidavit shall be read or made use of in any matter depending in court in the jurat of which there is any interlineation or erasure.

52. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed to, and according to the belief of such person did, understand the same, and also that the said party made his or her mark or wrote his or her signature in the presence of the person before whom the affidavit was made.

53. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a clerk of his proctor, solicitor, or attorney.

54. A proctor, solicitor, or attorney, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect to taking affidavits which are applicable to those in whose stead they are acting.

55. The Registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the Registrars of the Principal Registry of the Court of Probate, in the same way and to the same extent as the principal registry of the Court of Probate and the clerks therein is and are.

56. The Record Keepers, the Clerk of papers, the Sealer, the ushers, and other officers belonging to the Court of Probate, shall discharge the same duties in the Court for Divorce and Matrimonial Causes, and in the registry

thereof, as they discharge in the Court of Probate and the principal registry thereof.

57. The Judge Ordinary shall in every case in which a time is fixed by these rules for the performance of any act have a power to extend the same to such time and with such qualifications and restrictions and on such terms as to him may seem fit.

FURTHER
RULES AND REGULATIONS
MADE UNDER
The provisions of 20 & 21 *Vict. c.* 85, *and* 21 & 22 *Vict. c.* 108.

Office Copies, Extracts, &c.

1. The Registrars of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in and filed in any matter or suit depending in the Court for Divorce and Matrimonial Causes; and all rules and orders, and fees payable in respect of searches for and inspection or copies of and extracts from and attendances with documents deposited in the Registry of the Court of Probate, shall extend to such pleadings and other documents brought in and filed in the Court for Divorce and Matrimonial Causes, save that the length of such last-mentioned documents shall in all cases be computed at the rate of seventy-two words per folio.

2. Office copies of documents furnished from the Registry of the Court of Probate will not be collated with the originals from which the same are copied unless specially required. Every copy so required to be examined shall be certified under the hand of one of the Principal Registrars of the Court of Probate to be an examined copy.

Proceedings in Causes.

3. In order to prevent the time limited for bringing in answers and other pleadings and proceedings from expiring before application can be made to the Judge Ordinary for an extension thereof, any one of the Principal Registrars of the Court of Probate may, upon reasonable cause being shown, extend the time for bringing in such answer or

other pleading or proceeding, provided that such time shall in no case be extended beyond the day upon which the Judge Ordinary shall next sit in open Court or in Chambers.

4. No cause is to be called on for hearing or trial until after the expiration of ten days from the day when the same has been set down as ready for hearing or trial, and notice thereof has been given, save with consent of all parties to the suit.

5. The time fixed by these Rules and Regulations, or by former Rules and Regulations made under the provisions of 20 & 21 Vict. c. 85, for bringing in petitions, answers, and pleadings, or for any other proceeding in a cause depending in the Court for Divorce and Matrimonial Causes, shall in all cases be exclusive of Sundays.

Costs.

6. When an appointment has been made by a Registrar of the Court of Probate for taxing any bill of costs, and one party only attends at the time appointed, the registrar may nevertheless proceed to tax the bill after the expiration of a quarter of a hour, upon being satisfied by affidavit that due notice of the time appointed was served on the other party.

7. If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, the costs incurred in the taxation thereof shall be deducted from the sum allowed on taxation, if so much remains due, otherwise the same shall be paid by the practitioner to the client.

Affidavits.

8. No affidavit will be admitted in any matter depending in the Court for Divorce and Matrimonial Causes in which any material part is written on an erasure.

SUMMONSES.

1. A summons may be taken out by any person and in any matter or suit depending in the Court for Divorce and Matrimonial Causes.

2. A printed form must be obtained and filled up with the object of the summons. It must then be taken into the Registry, where the blank left in the printed form for the time when the summons is to be made returnable, will be filled up and the signature of the Registrar will be obtained.

3. The name of the cause or matter and of the agent taking out the summons is then to be entered in a book to be called the Summons Book, and the Summons returned to the applicant, who is to serve a copy on the party to be summoned. This copy (except in cases where the consent of the party to be served has been obtained and endorsed on the summons) must be served one clear day at least before the summons is returnable, and before 7 p.m. On Saturdays the copy of the summons is to be served before 2 p.m.

4. On the day and at the hour named in the summons the party issuing the same is to present himself with the original summons at the Judge's Chambers.

5. Both parties will be heard by the Judge, who will make such order as he may think fit, and a minute of such order will be made by the Registrar in the Summons Book.

6. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the other party shall be at liberty to go before the Judge, who will thereupon make such order as he may think fit.

7. An attendance on behalf of the party summoned for the space of half an hour, if the other party do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge on that occasion.

8. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the party summoned, must be filed in the Registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy.

9. If a summons is brought to the Registry, with consent to an order, signed by the party summoned, or his proctor, solicitor, or attorney, endorsed thereon, an order will be drawn up without the necessity of going before the Judge: Provided that the order sought is in the opinion of the Registrar one which the Judge, under the circumstances, would make.

(Signed) CHELMSFORD, C.
CAMPBELL.
A. E. COCKBURN.
FRED. POLLOCK.
WM. WIGHTMAN.
ED. VAUGHAN WILLIAMS.
SAMUEL MARTIN.
C. CRESSWELL.

TABLE OF FEES

TO BE TAKEN IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

	£.	s.	d
On every citation	0	5	0
On entering appearance	0	2	6
Filing a petition	0	5	0
Filing an answer	0	5	0
Filing a reply	0	5	0
Filing any further replication to a petition	0	5	0
Filing application for an order for the protection of a wife's earnings and property	0	5	0
Filing application for discharge of such order	0	5	0
Filing interrogatories	0	5	0
Filing answer of each deponent to interrogatories	0	5	0
On every motion by counsel, inclusive of filing the case for motion	0	5	0
Entering order of the Court on motion	0	5	0
Summons to attend in chambers	0	2	6
For entering order of Court on summons	0	2	6
Filing notice	0	1	0
On depositing the record	1	0	0
For the settling of the record by one of the registrars	1	0	0
Setting a cause down for hearing or trial	0	5	0
Entering sentence or final decree in a cause	0	10	0
Entering special verdict, if five folios of seventy-two words or under	0	2	6
If exceeding five folios, per folio of seventy-two words	0	0	6
Entering decree or order in pursuance of a written judgment from the Judge of an Ecclesiastical Court	0	10	0
Entering any decree or order for alimony	0	5	0
Entering order directing how damages shall be applied	0	5	0

Entering order providing for custody, maintenance, or education of children, if two folios of seventy-two words or under	0	5	0
Entering order for settlement of the wife's property, if two folios of seventy-two words or under	0	5	0
If either of the above orders exceed five folios, for each additional folio	0	2	0
Entering any minute, order, or decree in the Court Book other than the decrees or orders before specified	0	2	6
On withdrawal of a cause after same is set down for hearing, to be paid by the party at whose instance it is withdrawn	0	5	0
On the hearing or trial of a cause:			
From the plaintiff	1	0	0
From the defendant or defendants	0	15	0
If the hearing or trial continues more than one day, for each day:			
From the plaintiff	0	10	0
From the defendant or defendants	0	10	0
Producing the Judge's notes	0	5	0
Bill of exceptions signed by the Judge	0	5	0
Entering on the record the finding of the Jury or the decision of the Judge	0	5	0
On every subpœna	0	2	6
On a certificate under the hand of the Judge	0	2	6
On every commission issuing under seal of the Court	1	0	0
Writ of attachment	0	7	6
Writ of sequestration	1	0	0
On lodging instrument of appeal	0	10	0
Search in court books, if within the last two years	0	1	0
If at an earlier period than within two years	0	2	0
In case the court books to be searched or the documents required are not in the registry, in addition to the above	0	2	6
Filing and entry of remission of appeal	0	10	0
Filing exhibits, not exceeding ten, for each exhibit	0	1	0
Exceeding ten, but not exceeding twenty	0	10	0
Exceeding twenty but not exceeding fifty	0	15	0
If exceeding fifty	1	0	0
Office copies of minutes, orders, or decrees, Judge's notes or other documents filed in a cause:			
If five folios of seventy-two words or under	0	2	6

If exceeding five folios of seventy-two words, per folio	0	0	6
In case the same are under seal of the court, in addition for the seal	0	5	0
Filing every affidavit or other document brought into court or deposited in the registry for filing which no fee is before specified	0	2	6
Taxing every bill of costs:			
If three folios of seventy-two words or under	0	2	6
If exceeding three folios of seventy-two words			
When taxed, as between party and party, per folio	0	0	6
When taxed as between practitioner and client, per folio	0	1	0
For administering oaths to each deponent	0	1	0
Examiner appointed to take evidence under a commission for examination of witnesses, for each day's attendance, besides travelling expenses	3	3	0

ADDITIONAL TABLE OF FEES

TO BE TAKEN IN

THE REGISTRY OF THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

	£.	s.	d.
For marking each Exhibit annexed to an affidavit	0	1	0
For settling the form of advertisements of citations or other advertisements	0	5	0
For taking the evidence of one or more witnesses before the Registrar, for each day, and within three miles of the General Post Office	3	3	0
If beyond that distance	5	5	0
If for part of a day only, such smaller fee as the Registrar in his discretion shall think proper.			
For entering order for the protection of a wife's earnings and property	0	5	0
For the order under seal of the Court	0	10	0

For entering an order of the Registrars of the Court of Probate the same fee as would be payable for entering a similar order made by the Judge.			
For each appointment of a Commissioner . .	1	0	0
For a rule nisi for a new trial	0	5	0

FEES

TO BE TAKEN FOR THEIR OWN USE

BY THE

PROCTORS, SOLICITORS AND ATTORNIES.

Practising in her Majesty's Court for Divorce and Matrimonial Causes.

Citations, Subpœnas, Writs, and Service of same.

	£	*s.*	*d.*
Citation, including præcipe	0	7	6
Citation to see proceedings, including præcipe	0	7	6
Certificate of service	0	2	6
Subpœna ad testificandum and præcipe . .	0	7	6
Subpœna duces tecum, if five folios of seventy-two words or under, and præcipe . . .	0	7	6
If the subpœna exceeds five folios in length, for each additional folio of seventy-two yards .	0	1	0
Writ of attachment, including præcipe . .	0	7	6
Writ of sequestration, including præcipe . .	0	7	6
Service of petition, citation, or subpœna, if within miles of the place of business of the practitioner, or of the person employed to effect the service	0	5	0
If beyond that distance and not exceeding ten miles, for every mile one way . .	0	1	0
Drawing and engrossing affidavit of service, if three folios of seventy-two words or under .	0	5	0
If above for every additional folio, including two a copy for the Court . . .	0	1	4
In cases in which the person to be served shall avoid service, or shall reside beyond the jurisdiction, except in Scotland or Ireland, a sum to be allowed for service according to the circumstances.			

Instructions.

Instructions for citations, petitions, answers, or other pleadings, for interrogatories, special affidavits, or applications for an order for protection of a wife's earnings and property .	0	6	8
Ditto to defend suit	0	6	8
Ditto for brief, or case for hearing . .	0	13	4
If there are several witnesses examined, and the brief or case is necessarily long, an additional fee will be allowed.			

Pleadings.

Drawing and engrossing petition, if ten folios of seventy-two words or under, including a copy to file	1	0	0
If exceeding ten folios, for every additional folio, including a copy to file . . .	0	1	4
Drawing and engrossing answers, replications, and other subsequent statements, petitions for alimony, and answers thereto, if ten folios of seventy-two words or under, including a copy to file	1	0	0
If exceeding ten folios, for every additional folio, including a copy to file . . .	0	1	4
Copies of petitions, answers, and other pleadings, also of exhibits, or other documents, at per folio of seventy-two words . . .	0	0	4
If any exhibit or other document to be copied, or any part thereof contains pencil marks or writing, or the copy thereof, or any part thereof, is required to be made fac simile, in addition to any other fee for the copy:			
For every folio of pencil marks or writing, or copy fac simile, or part of a folio .	0	0	4
Drawing the record, if fifteen folios of seventy-two words or under, including copy to file .	0	10	0
If exceeding fifteen folios, for every additional folio of seventy-two words, including copy to file 0	0	8	
Engrossing record to file, at per folio of seventy-two words, exclusive of parchment . .	0	0	6
For case for motion, including fair copy for Judge	0	10	0
If necessarily more than seven folios of seventy-two words in length, for every additional folio, including copy for the Judge . .	0	1	4

	£	s.	d.
Copy for adverse party, per folio of seventy-two words	0	0	4
Drawing and engrossing demurrer, inclusive of the statement of any matter of law to be argued, for ten folios of seventy-two words or under	0	10	0
If exceeding ten folios of seventy-two words, for every additional folio of seventy-two words	0	1	0
Copy of the issue on demurrer, at per folio of seventy-two words	0	0	4
Drawing bill of costs, per folio of seventy-two words, including copy for taxation	0	1	0
Copy for the adverse party, per folio of seventy-two words	0	0	4
Drawing any instrument to be filed in or issued by the registry for which no other fee is herein allowed, inclusive of fair copy to be filed or issued, per folio of seventy-two words	0	1	4
For perusing and abstracting pleadings, affidavits, exhibits, and other documents, per folio of seventy-two words	0	0	4

Notices.

All necessary notices, if three folios or under, inclusive of copy and service	0	5	0
If exceeding three folios, for every additional folio, including copy and service	0	1	0
In all cases where service of a notice is necessary beyond two miles of the place of business of the practitioner, or of the person employed to effect the service, the same fee as upon the service of a citation.			
Copy of summons or order of the judge, or rule nisi, and service	0	5	0

Attendances.

On entering appearance	0	6	8
To search for appearance to citation	0	6	8
On counsel with brief, when the fee to counsel is one guinea	0	3	4
When the fee to counsel exceeds one guinea and is under five guineas	0	6	8
When the fee is five guineas and upwards	0	13	4
On consultation	0	13	4
On conference	0	6	8

	£	s.	d.
In pursuance of notice to admit	0	6	8
For every hour after the first	0	6	8
On trial or hearing when cause is in paper and not tried or heard, or on motion in court	0	13	4
On trial or hearing	1	1	0
If it lasts the whole day	2	2	0
On taxation of bill of costs	0	13	4
If very long an additional fee will be allowed.			
On examination of witnesses under a commission—			
If in England or Wales, per diem	2	2	0
If elsewhere	3	3	0
For all necessary attendances in chambers before the Judge Ordinary, or before a commissioner, or counsel, in the Registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed	0	6	8

Briefs, Cases for Hearing, Letters, &c.

	£	s.	d.
For drawing brief or case for hearing, per folio of seventy-two words	0	1	0
For each copy, per folio of seventy-two words	0	0	4
Every necessary letter during the dependance of the cause	0	3	6
Term fees, letters, and messengers, each term in which any business is done	0	15	0
For maps or plans each from	1	1	0
	to		
	3	3	0
Copies of same, if required each from	0	10	0
	to		
	1	0	0

Affidavits.

	£	s.	d.
For drawing affidavit, if five folios of seventy-two words or under, including copy for the Court or Registry	0	6	8
If above five folios, for each additional folio, including copy for the court	0	1	4

Interrogatories.

	£	s.	d.
For drawing the same, at per folio of seventy-two words	0	1	0
Copy thereof to be delivered to the examiner and filed, at per folio of seventy-two words	0	0	4

If it becomes necessary for proctors, solicitors, or attor-

nies to transact any business for which no fee is herein specified, such fee shall be taken by them as would be allowed for similar business done in the Courts of Common Law and Equity, as the case may be.

FEES

TO BE TAKEN FOR THE USE OF OTHER PERSONS

BY THE

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in the Court for Divorce and Matrimonial Causes.

Counsels' Clerks's Fees.

Not to exceed as under:	£	s.	d.
Upon a fee to counsel under 5 guineas . .	0	2	6
5 guineas and under 10 guineas . .	0	5	0
10 guineas and under 20 guineas . .	0	10	0
20 guineas and under 30 guineas . .	0	15	0
30 guineas and under 50 guineas . .	1	0	0
50 guineas and upwards—at per cent. on the fee paid	2	10	0
On consultation:			
Senior's clerk	0	7	6
Junior's clerk	0	2	6
On a general retainer	0	10	6
On a common retainer	0	2	6
On conference	0	5	0

Witnesses' Expenses.

Allowance to witnesses, including their board and lodging:			
Common witnesses, such as labourers, journeymen, &c. &c.:			
If resident within five miles of the General Post Office, per diem .	0	5	0
If resident beyond that distance, per diem, from	0	5	0
	to		
	0	7	6

	£.	s.	d.
Master tradesmen, yeomen, farmers, &c.:			
If resident with five miles of the General Post Office, per diem, from	0	7	6
	to		
	0	10	0
If resident beyond that distance, per diem, from	0	10	0
	to		
	0	15	0
Auctioneers and Accountants:			
If resident within five miles of the General Post Office, per diem, from	0	10	6
	to		
	1	1	0
If resident beyond that distance, per diem, from	0	10	6
	to		
	1	1	0
Professional men:			
If resident within five miles of the General Post Office, per diem	1	1	0
If resident beyond that distance, per diem, from	2	2	0
	to		
	3	3	0
Clerks to attornies, or others:			
If resident within five miles of the General Post Office, per diem	0	10	6
If resident beyond that distance, per diem, from	1	15	0
	to		
	0	1	0
Engineers and surveyors:			
If resident within five miles of the General Post Office, per diem	1	1	0
If resident beyond that distance, per diem, from	1	1	0
	to		
	3	3	0
Notaries, per diem	1	1	0
Esquires, bankers, merchants, and gentlemen, per diem	1	1	0
Females, according to station in life:			
If resident within five miles of the General Post Office, per diem, from	0	5	0
	to		
	0	10	0
If resident beyond that distance, per diem, from	0	5	0
	to		
	1	0	0
Police inspector:			
If resident within five miles of the General Post Office, per diem	0	5	0
If resident beyond that distance, per diem, from	0	7	6
	to		
	0	10	0

	£	s.	d.
Police constable:			
If resident within five miles of the General Post Office, per diem . .	0	3	0
If resident beyond that distance, per diem, from	0	5 to 7	0 6

The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1*s.* per mile one way.

Surrogates or Commissioners for taking oaths:			
For administering oaths to each deponent	0	1	6
For marking each exhibit annexed to an affidavit	0	1	0

(Signed) CHELMSFORD, C.
CAMPBELL.
A. E. COCKBURN.
FRED. POLLOCK.
WM. WIGHTMAN.
ED. VAUGHAN WILLIAMS.
SAMUEL MARTIN.
C. CRESSWELL.

FORMS,

Which are to be followed as nearly as the circumstances of each case will allow.

No. 1.—*Citation.*

In her Majesty's Court for Divorce and Matrimonial Causes.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To *A.B.*, of , in the county of .
Whereas *C.B.*, of , claiming to have been lawfully married to you the said *A.B.*, has filed her petition against you in our said court, praying for wherein she alleges that you have committed adultery [*or* have been guilty of cruelty towards her the said *C.B.*, *or as the case may be*]: Now this is to command you, that within eight days of the service of this on you, inclusive of the day of such service, you do appear in our said court then and there to make answer to the said petition, a copy whereof, sealed with the seal of our said court, is herewith served upon you. And take notice, that in default of your so doing, the Judge Ordinary of our said court [*or* the Judges of our said court] will proceed to hear the said charge [*or* charges] proved in due course of law, and to pronounce sentence therein, your absence, notwithstanding.

(Signed) *E.F.*, Registrar.

L. S.

Indorsement to be made after service.

This citation was duly served by *G.H.* on the within-named *A.B.*, of at on the day of 18 .

(Signed) *G.H.*

No. 2.—*Præcipe for Citation.*

In her Majesty's Court for Divorce and Matrimonial Causes.

Citation for *A.B.*, of , against *C.B.*, of , for a judicial separation by reason of adultery [*or as the case may be*].

(Signed) *P.A.*, proctor, solicitor, *or* attorney for the said *C.B.* [*or C.B.* in person.]

No. 3.—*Petition for Divorce.*(*a*)

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18 .

The petition of *A.B.*, of , showeth,—

1. That your petitioner was on the day of , 18 , lawfully married to *C.B.*, then *C.Z.*, widow, at :
2. That after his said marriage your petitioner lived and cohabited with his said wife at , and at , and that your petitioner and his said wife have had issue of their said marriage three children; to wit, one son and two daughters:
3. That on the day of , 18 , and other days between that day and , the said *C.B.*, at , in the county of , committed adultery with *R.S.*:
4. That in and during the months of January, February, and March, 18 , the said *C.B.* frequently visited the said *R.S.* at , and on divers of such occasions committed adultery with the said *R.S.*

Your petitioner therefore humbly prays,—

That your Lordship will be pleased to decree:

[*Here set out the Relief sought.*]

And that your petitioner may have such further and other relief in the premises as to your Lordship may seem meet.

And your petitioner will ever pray, &c.(*b*)

No. 4.—*Form of Answer.*

In her Majesty's Court for Divorce and Matrimonial Causes.

The day of , 18 .

A.B. v. *C.B.*

(*a*) If the petition be for judicial separation, the above form is good; if for divorce, it must be addressed "To the Judges of Her Majesty's Court for Divorce and Matrimonial Causes." *Evans* v. *Evans*, 6 W. R. 356; *Wright* v. *Wright*, 28 L. J. P. & M., 32.

(*b*) It may be here observed that affidavits should be intitled in the Court and cause; but if a petition for dissolution of marriage has been filed, but no citation has issued, affidavits should either have no heading or be entitled, "In the matter of the Petition of *A.B.*" *Gapp* v *Gapp*, 28 L. J., P. & M. 48.

The respondent, *C.B.*, by *P.A.*, her proctor, solicitor *or* attorney [*or* in person], saith,—

1. That she denies that she committed adultery with *R.S.*, as set forth in the said petition:
2. Respondent further saith, that on the day of , 18 , and on the other days between that day and , the said *A.B.*, at , in the county of , committed adultery with *X.Y.*

[*In like manner respondent is to state connivance, condonation, or other matters relied on as a ground for dismissing the petition.*]

Wherefore this respondent humbly prays,—

That your Lordship will be pleased to reject the prayer of the said petition, and decree, &c.

And this respondent will ever pray, &c.

No. 5.—*Entry of an Appearance.*

In her Majesty's Court for Divorce and Matrimonial Causes.

A.B., Petitioner,
v.
C.B., Respondent,

The Respondent, *C.B.*, appears in person, [*or* *E.F.*, proctor, solicitor, or attorney for *C.B.*, appears for the Respondent].

[*Here insert the address required by Rule No.* 13.]

Entered this day of , 18 .

No 6.—*Form of Subpœna ad testificandum.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*names of all witnesses included in the subpœna*], greeting. We command you and every of you to be and appear in your proper persons before [*insert the name of the judge*], Judge Ordinary of our Court for Divorce and Matrimonial Causes, at , on the day of , 18 , by of the clock in the forenoon of the same day, and so from day to day until the cause of proceeding is tried, to testify the truth, according to your knowledge, in a certain cause now in our court before our said judge depending [*or* now before our said court depending], between *A.B.*, petitioner,

and *C.B.*, respondent [*or* in a certain cause or proceeding now in our court before our said judge depending (*or* now before our said court depending), in default of the appearance of], on the part of the [petitioner *or* respondent, *or as the case may be*], and at the aforesaid day between the parties aforesaid to be tried [*or* in default as aforesaid, between the parties aforesaid to be tried]. And this you nor any of you shall in nowise omit, under the penalty of every of you of 100*l.* Witness [*insert the name of the judge*], at the Court for Divorce and Matrimonial Causes, the day of , 18 , in the year of our reign.

(Signed) *E.F.*, Registrar.

No. 7.—*Præcipe for Subpœna ad testificandum.*

In her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna of [*insert witnesses' names*], to testify between *A.B.*, Petitioner, and *C.B.*, Respondent, on the part of the Petitioner [*or* Respondent].

Signed) $\left\{\begin{matrix} A.B. \\ \hline C.B. \end{matrix}\right\}$ *or* $\left\{\begin{matrix} P.A., \text{Petitioner's } or \text{ Respondent's] proctor, solicitor, } or \\ \text{attorney.} \end{matrix}\right.$

No. 8.—*Subpœna duces tecum.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*names of all parties included in the subpœna*], greeting. We command you and every of you to be and appear in your proper persons before [*insert the name of the judge*], Judge Ordinary of our Court for Divorce and Matrimonial Causes [*or* before our said court, *as the case may be*], at , on the day of , by of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is heard, and also that you bring with you, and produce at the time and place aforesaid [*here describe shortly the deeds, letters, papers, &c., required to be produced*], then and there to testify and show all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain cause or proceeding now in our said court

before our said Judge Ordinary [*or* now before our said court, *as the case may be*] depending, between *A.B.*, petitioner, and *C.B.*, respondent [*or* in a certain cause or proceeding now in our said court before our said Judge Ordinary (*or* now before our said court) depending, in default of the appearance of], on the part of the petitioner [*or* respondent], and on the aforesaid day between the parties aforesaid to be tried. And this you nor any of you shall in nowise omit under the penalty of every of you of 100*l.* Witness [*insert the name of the judge*], at our Court for Divorce and Matrimonial Causes, the day of , 18 , in the year of our reign.

(Signed) *E.F.*, Registrar.

No. 9.—*Præcipe for Subpœna duces tecum.*

In her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna for to testify and produce, *&c.* between *A.B.*, Petitioner, and *C.B.*, Respondent, on the part of the Petitioner *or* [Respondent].

(Signed) $\left\{\begin{matrix} A.B. \\ C.B. \end{matrix}\right\}$ *or* $\left\{\begin{matrix} P.A., \text{Petitioner's [}or\text{ Respondent's] proctor, solicitor, } or \\ \text{attorney.} \end{matrix}\right.$

No. 10.—*Notice to admit Documents.*

A. B. v. *C.B.*

In her Majesty's Court for Divorce and Matrimonial Causes.

Take notice, that the $\frac{\text{petitioner}}{\text{respondent}}$ in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the $\frac{\text{respondent}}{\text{petitioner}}$ at on , between the hours of and , and the $\frac{\text{respondent}}{\text{petitioner}}$ is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively

to have been, that such as are specified to be copies are true copies, and that such documents as are stated to have been served, sent, or delivered were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in the cause.

To { *C.B.* / *A.B.* } *or* to *E.F.*, proctor, solicitor, *or* attorney for

(Signed) { *A.B.* / *C.B.* } or *G.H.*, proctor, solicitor, *or* attorney for

[*Here describe the Documents*].

No. 11.—*Form of Record.*

In her Majesty's Court for Divorce and Matrimonial Causes.

The day of , 18 .

A.B. v. *C.B.*

A.B. did, in his petition presented in this cause, allege that *C.B.* did, to wit on the day of , 18 , commit adultery with *R.S.*

[*Here insert the allegations of the petition.*]

C.B. did, in answer thereto, deny [*insert the denial and any other necessary matters contained in the answer*]. Whereupon the said *A.B.* denied that [*here insert the substance of the replication, if any, and so on for the further statements, if any*].

Therefore let a jury come.

No. 12.—*Petition for Alimony.*

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

C.B. v. *A.B.*

The day of , 18 .

The petition of *C.B.*, the lawful wife of *A.B.*, showeth,—

1. That the said *A.B.* has for many years carried on the business at , and from such

business derives the net annual income of £ :

2. That the said *A.B.* holds shares of the Railway Company, amounting in value to £ , and yielding a clear annual dividend to him of £ :

3. That the said *A.B.* is possessed of stock-in-trade in his said business of to the value of £ .

[*And so on for any other faculties which the husband may possess.*]

Your petitioner therefore humbly prays,—

That your Lordship will be pleased to decree her such sum or sums of money by way of alimony *pendente lite* [*or* permanent alimony] as to your Lordship shall seem meet.

And your petitioner will ever pray, &c.

No 13.—*Form of Application under Sect.* 21.

To the Judge Ordinary of the Court for Divorce and Matrimonial Causes.

The application of *C.B.*, of , the lawful wife of *A.B.*, showeth,—

That on the day of she was lawfully married to *A.B.* at :

That she lived and cohabited with the said *A.B.* for years at , and also at , and hath had children, issue of her said marriage, of whom are now living with the applicant, and wholly dependent upon her earnings:

That on or about the said *A.B.*, without any reasonable cause, deserted this applicant, and hath ever since remained separate and apart from her:

That since the desertion of her said husband this applicant hath maintained herself by her own industry [*or* on her own property, *as the case may be*], and hath thereby and otherwise acquired certain property, consisting of [*here state generally the nature of the property*],

Wherefore she prays an order for the protection of her earnings and property acquired since the said day of , from the said *A.B.*, and from all creditors and persons claiming under him.

No. 14.—*Petition for reversal of Decree.*

To the Judge Ordinary of her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18 .

The petition of *A. B.*, of , showeth,—

1. That your petitioner was on the day of lawfully married to :
2. That on the day of your Lordship, at the petition of , pronounced a decree affecting this petitioner, to the effect following; to wit:

[*Here set out the decree.*]

3. That such decree was obtained in the absence of your petitioner, who was then residing at

[*State facts tending to show that the petitioner did not know of the proceedings; and further, that had he known he might have offered a sufficient defence.*]

or,

That there was reasonable ground for your petitioner leaving his said wife, for that his said wife

[*Here state any legal grounds justifying the petitioner's separation from his wife.*]

Your petitioner therefore humbly prays,—

That your Lordship will be pleased to reverse the said decree.

And your petitioner will ever pray, &c.

The following additional Forms may be found useful; we have numbered them consecutively with those in the Rules and Orders:—

No. 15.—*Petition alleging Incestuous Adultery.*

To the Judges of her Majesty's Court for Divorce and Matrimonial Causes.

The day of A. D.

The petition of *A.B.*, of showeth,—

1. That your petitioner was on the day of , 18 , lawfully married to *C.D.*, then a bachelor (or widower), at
2. That after her said marriage your petitioner lived and cohabited with her said husband at , and at , and that your petitioner and her said husband have had issue of their said marriage nine children; to wit, five sons and four daughters;
3. That John Smith and Mary Smith were on the day of in the year of our Lord one thousand eight hundred and , lawfully married together at , and that your petitioner is the lawful child of the marriage of the said John and Mary Smith, and that one Jane Smith is also the lawful (*a*) child of the said John Smith and Mary Smith.
4. That the said *C.D.*, on the day of , in the year of our Lord one thousand eight hundred and fifty , at , incestuously committed adultery with the said Jane Smith, sister or half-sister of your petitioner.

Your petitioner therefore humbly prays, &c.

No. 16.—*Petition alleging Bigamy with Adultery.*

(For a woman.)

To the Judges of her Majesty's Court for Divorce and Matrimonial Causes.

The day of A.D. 18 .

The petition of *A.B.*, showeth,

1. That your petitioner was on the day of in the year of our Lord one thousand eight hundred and , lawfully married to *C.B.*, bachelor, at Saint Mary's church, in the parish of
2. That after the said marriage your petitioner lived and cohabited with her said husband at , in the county of , and at in

(*a*) The word lawful is unnecessary here, as it must be remembered that illegitimate children cannot marry with their legitimate brothers or sisters, &c.

the county of , and that your petitioner and her said husband have had issue of their said marriage four children, to wit, two sons and two daughters.

3. That afterwards, that is to say, on the day of , one thousand eight hundred and fifty , at , in the county of , the said *C.B.* feloniously and unlawfully did marry and take to wife one *E.F.*, and to her, *E.F.*, was then and there married.

4. That the said *C.B.* afterwards, that is to say, at , in the county of , on the day of , one thousand eight hundred and fifty , consummated the said pretended and illegal marriage with the said *E.F.*, and cohabited and lived and committed adultery with her at , in the county of , on the day of , and on the day of , and at on the day of , and on divers other occasions.

Your petitioner therefore, &c.

No. 17.—*Petition alleging Cruelty.*

To the Judge Ordinary of her Majesty's Court for Divorce and Matrimonial Causes.

The day of A.D. 18 .

The petition of *A.B.* showeth,

1. That, &c. (as in Form 15, p. lxxix.)

2. " " " "

3. That on the day of , in the year of our Lord One thousand eight hundred and fifty , and on other occasions, the said *C.D.*, did at , on the day of and on other occasions did make an assault upon and beat the petitioner.

4. That on the day, of , the said *C.D.*, did at , spit in the face of the petitioner.

5. That on or about the day of the said *CD.*. did communicate a venereal disease to the petitioner (*a*).

(*a*) If this allegation be inserted, it is, of course, also evidence of adultery. See *ante*, "Digest;" and the petition must

6. That your petitioner cannot, by reason of the premises, safely live and cohabit with him the said *C.D.*

Your petitioner therefore, &c.

[The following is the petition in *Marchmont* v. *Marchmont*:—

"1. That, &c. (as in Form 15, p. .)

"2. " " "

"3. That shortly after their said marriage the said *H.M.*, commenced and has to the present time continued treating your petitioner with great unkindness and cruelty, that he frequently endeavoured to extort, and did extort, large sums of money from your petitioner by violence and threats of violence; that he frequently in violent and offensive language abused your petitioner, violently assaulted her, and, on one occasion, in the month of February, 1858, struck your petitioner on the forehead; that by reason of the said continued ill-treatment on the part of her said husband your petitioner's health has been greatly impaired.

"4th. That by reason of her husband's ill-treatment and threats, your petitioner has on divers occasions been compelled to leave her house and seek the protection of her friends, but has been induced to return to cohabitation with her said husband by his solemn promise that he would treat her kindly for the future; that in consequence of her said husband violating his promises and continuing to treat your petitioner with said unkindness and cruelty, your petitioner was compelled to seek the protection of the law; that accordingly on the 10th day of June inst., your petitioner's said husband was by warrant brought before the Honourable G. C. N. one of the magistrates sitting at the Lambeth Police Court, and was by the said magistrate bound over to keep the peace towards your petitioner for three months; that your petitioner nevertheless has been too much alarmed to return, and has not returned to cohabit with her said husband.

"Your petitioner therefore, &c."]

No. 18.—*Petition in cases of Nullity by reason of undue Celebration, or Impotency.*

1. That on the day of , a mar-

then be addressed to "The Judges," &c., and include an allegation of adultery.

riage was at had and celebrated according to form by law established between your petitioner and *C. B.*

2. That, &c. (*If it be a case of nullity by reason of defect in the marriage itself, such as undue publication of banns proceed as in* No. 15. p. lxxix.
3. That (*Set out such irregularities as render the marriage a nullity*) as the said marriage was by banns; but the said *C. B.*, and your petitioner wilfully and fraudulently caused such banns to be published in the names of *A. S. H.* and *C. B.*

If the case be of Impotency, instead of Nos. 2 *&* 3, *say*:—

"2. That at the time of the celebration of such pretended marriage as aforesaid your petitioner was of the age of , [this must be within the natural age for the procreation of children], and the said *C. B.* was of the , but the said *C. B.* then was and is incurably malformed, deformed, and impotent, and incapable of consummating the said marriage, whereof your petitioner was then unaware.

Your petitioner therefore humbly prays that your Lordships will be pleased to declare that the said marriage in fact, but illegally, celebrated between your petitioner and the said *C. B.* is null and void.

And to decree that the said *C. B.*, may pay the costs of and incident to this suit.

And that your petitioner may have such further and other relief in the premises as to your Lordships may seem meet.

And your petitioner will &c.

No. 19.—*Petition in cases of Nullity by reason of Bigamy.*

[Commence as in Form 15, calling the petitioner by her maiden name, and adding "falsely called *A. B.*" the husband's name.]

1. That, &c. [as in Form 18, p. lxxxii).
2. That on the day of , the said *C. B.* was at , in lawfully married to *H. B.*, then *H. X.*, spinster.
3. That at the time of such celebration as in the first paragraph mentioned, the said *H. B.* was still alive, and was then still the lawful wife of the said *C. B.*

Your petitioner therefore &c. (as in Form 18).

No. 20.—*Petition in cases of Nullity by reason of Consanguinity.*

[Commence as in Form 18].

1. That &c. (as in Form 18).
2. That the petitioner is the niece of the said *C. B.*

Your petitioner therefore, &c. (as in Form 18).

No. 21.—*The same by reason of Affinity.*

[Commence as in Form 20.]

1. That, &c. (as in Form 20).
2. That the said *C. B.* was on the day of , lawfully married to *E.B.* then *E.F.*, spinster.
3. That your petitioner is the sister of the said *E.B.* formerly *E F.*

Your petitioner, &c. (as in Form 18).

No. 22.—*The Same by reason of Insanity.*

The petition of *G.H.*, Committee of the person and estate of *A.B.*, showeth,—

1. That, &c. [As in Form 18, substituting "*A.B.*," for petitioner, and giving the maiden name of the alleged wife, say *A.S.*]
2. That such celebration was procured by the fraudulent contrivance of the said *A.S.*
3. That at the time of such celebration as aforesaid the said *A.B.* was of unsound mind, and incapable of duly contracting marriage.

Your petitioner therefore humbly prayeth that your Lordships will be pleased to declare that the said marriage in fact, but illegally celebrated, between the said *A.B.* and *A.S.* is null and void

And to decree that the said *A.S.* may pay the costs of and incident to the suit.

And that your petitioner and the said *A.B*, may have such further and other relief in the premises as to your Lordships may seem meet.

And your petitioner, &.

No. 23.—*Petition for Restitution of Conjugal Rights.*

(Commence as in Form 15. p. lxxx.)

1. That &c. (As in Form 15).
2. That &c. (As in Form 15).
3. That the said *C.B.* hath ever since the day of without any just cause refused and still doth refuse to permit your petitioner to cohabit with him, and to render her conjugal rights.

Your petitioner therefore prays that your Lordship will be pleased to declare that your petitioner was lawfully married to the said *C.B.*, and to order that the said *C.B.* do take home and receive your petitioner, as his wife, and render her conjugal rights, and that he pay the costs, &c.

And that your petitioner may have such further and other relief, &c.

And your petitioner will ever pray, &c.

No. 24.—*Answer to the Above* (*a*).

[Commence as in Form 4, p. lxxiii.]

1. That he denies that he hath refused to permit the petitioner to cohabit with him as alleged.
2. That he denies that he refused to render her conjugal rights as alleged.
3. That before such refusal on his part, as in the petition alleged, the petitioner had on the day of , at , and on other occasions, committed adultery with one , wherefore he, the respondent, refused her cohabitation and conjugal rights as alleged.
4. That before such refusal on his part, as alleged, the petitioner did on the day of , and on other occasions, strike, beat, and behave cruelly to the respondent [set out acts as in Petition for Cruelty, *ante*, No. 18]. Wherefore, &c.

[If the Respondent insert the first two paragraphs only, conclude as in Form 4, *ante*. If, however, he allege the facts contained in the third paragraph, it would seem that the following would be the correct conclusion.]

(*a*) See "Digest," "Restitution."

N.

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By 14 & 15 Vic - cap. 99. Evidence of husb'd & wife not admissible ~~to prove~~ in cases of adultery against each other.
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19 [illegible] c. 119. a Marriage Act - amen

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